SHDKT PROCEEDINGS AND ORDERS DATE: [01/12/93]

CASE NBR: [92100104] CFX STATUS: [DECIDED]
SHORT TITLE: [Ada, Gov. of Guam]
VERSUS [Guam Socy. of OBGYN, et al.] DATE DOCKETED: [071592]
PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jul 15 1992	D	Petition for writ of certiorari filed.
2	Aug 18 1992		Brief of respondent Guam Socy. of OBGYN in opposition filed.
3	Aug 18 1992		Ten sealed envelopes lodged by the Respondents as an Appendix to the above described brief.
4	Aug 19 1992		DISTRIBUTED. September 28, 1992
5	Sep 15 1992	X	Reply brief of petitioner Ada, Governor of Guam filed.
6	Sep 28 1992		Supplemental brief of respondents filed.
7	Oct 5 1992		REDISTRIBUTED. October 9, 1992
8	Oct 8 1992		Record requested -- AS.
9	Oct 14 1992		REDISTRIBUTED. October 30, 1992
10	Oct 21 1992		Record filed.
		*	Proceedings from USCA/9 and District Court of Guam (2 boxes)
12	Nov 2 1992		REDISTRIBUTED. November 6, 1992
14	Nov 9 1992		REDISTRIBUTED. November 13, 1992

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Last page of docket

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	DATE	NOTE	PROCEEDINGS & ORDERS
16	Nov 19 1992		REDISTRIBUTED. November 25, 1992
17	Nov 30 1992		Petition DENIED. Dissenting opinion by Justice Scalia with whom The Chief Justice and Justice White join. (Detached opinion.)

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92-104

No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH F. ADA, GOVERNOR OF GUAM,
in his official capacity,
Petitioner,

v.

GUAM SOCIETY OF OBSTETRICIANS & GYNECOLOGISTS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Guam Public Law 20-134 prohibits abortion except (i) in cases of ectopic pregnancy or (ii) in any other pregnancy after implantation if two physicians, who practice independently of each other, "reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair [her] health." Abortions allowed by P.L. 20-134 must be performed in "an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam." In this facial challenge, the court of appeals affirmed the district court's judgment declaring the law unconstitutional in its entirety and permanently enjoining its enforcement.

Whether Guam P.L. 20-134 is unconstitutional in all of its possible applications, before and after viability; and, if not, whether it may be enforced in its constitutionally permissible applications.

PARTIES TO THE PROCEEDINGS

Petitioner is the Honorable Joseph F. Ada, Governor of Guam.

Respondents are the Guam Society of Obstetricians & Gynecologists; the Guam Nurses Association; The Rev. Milton H. Cole, Jr.; Laurie Konwith; Edmund A. Griley, M.D., William S. Freeman, M.D., and John Dunlop, M.D.; on behalf of themselves and all others similarly situated, and all their women patients.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, the Honorable Joseph F. Ada, Governor of Guam, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on April 16, 1992.

OPINIONS BELOW

The April 16, 1992, opinion of the United States Court of Appeals for the Ninth Circuit (as amended by an order of June 8, 1992), affirming the judgment of the district court declaring Guam Public Law 20-134 unconstitutional and permanently enjoining its enforcement, is not yet reported but is reproduced in the Appendix to this Petition as Appendix A. The opinion of the United States District Court for the District of Guam is reported at 776 F. Supp. 1422 (D. Guam 1990), and is reproduced in the Appendix to this Petition as Appendix B. The amended

judgment of the district court, entered on October 16, 1990, is reproduced in the Appendix to this Petition as Appendix C.

JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 16, 1992. This Petition is being filed within 90 days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1987).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Guam Organic Act, 48 U.S.C. § 1421b(u) (1988):

> The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam . . . and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

Guam Public Law 20-134, reproduced in the Appendix to this Petition as Appendix D.

STATEMENT OF THE CASE

This Petition concerns a facial challenge to the constitutionality of Guam Public Law 20-134, which prohibits abortion except (i) in cases of ectopic pregnancy or (ii) in any other pregnancy after implantation if "there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair [her] health." P.L. 20-134, §§ 2, 3. Petitioner is Joseph F. Ada, Governor of Guam, who exercises the "executive power of Guam" and is "responsible for the faithful execution of the laws" of the territory. Guam Organic Act, 48 U.S.C. § 1422 (1988).

On March 19, 1990, Governor Ada signed into law Substitute Bill 848, which was unanimously passed by the Guam Legislature on March 8, 1990. Section 1 sets forth legislative findings that "[the] life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being." P.L. 20-134, § 1. The stated purpose of the law is "to protect the unborn children of Guam." *Id.* The term "unborn children" includes "any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development." *Id.*

Section 2 defines abortion as "the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus." *Id.* Thus, P.L. 20-134 does not restrict the use of contraceptives. Section 2 specifically excludes from the definition of abortion "medical intervention" in an ectopic pregnancy and in any other pregnancy if two physicians who practice independently of each other "reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair [her] health." *Id.* Abortions allowed by § 2 must be performed in "an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam." *Id.*

Section 3 makes it a felony to perform an "abortion" as that term is defined in § 2. *Id.*, § 3. If a licensed physician performs an illegal abortion, "the Guam Medical Licensure Board shall take appropriate disciplinary action." *Id.*[1] Sections 4 and 5 prohibit solicitation of

[1] A physician is not subject to disciplinary action for violating P.L. 20-134 unless he has been convicted in a criminal prosecution. 10 Guam Code Ann. § 12221(a) (1982).

abortion by a pregnant woman or anyone else. *Id.*, §§ 4, 5.[2] Section 6 repeals an earlier Guam law, and § 7 provides for a public referendum on whether P.L. 20-134 should be repealed "in its entirety." *Id.*, §§ 6, 7.

On March 23, 1990, four days after the law went into effect and before it had been enforced against any of the plaintiffs or their patients, plaintiffs filed a federal class action against defendant and other public officials challenging P.L. 20-134 as violative of the United States Constitution, the Civil Rights Act (42 U.S.C. § 1983 (1988)), and the Guam Organic Act (48 U.S.C. § 1421 *et seq.* (1988)). The district court had subject matter jurisdiction. 28 U.S.C. § 1331 (1987). On the same date, the court granted plaintiffs' request for a temporary restraining order enjoining enforcement of the law.

Plaintiffs moved for summary judgment and a permanent injunction on a variety of constitutional grounds, and for summary judgment under 42 U.S.C. § 1983. In addition to opposing plaintiffs' motions, defendant filed a motion for partial summary judgment—arguing that *Roe v. Wade*, 410 U.S. 113 (1973), does not apply to Guam—and a combined motion to dismiss him in his personal capacity and to dismiss plaintiffs' action under 42 U.S.C. § 1983.

In its "Decision and Order" entered on August 23, 1990, the district court held that *Roe v. Wade* applies to Guam; that P.L. 20-134 violates *Roe*; that the solicitation provisions of the law (§§ 4, 5) violate the Free Speech Clause of the First Amendment; and that the Governor is subject to injunctive relief under 42 U.S.C. § 1983 when acting in his official capacity. Appendix B.[3] The court did not address any of plaintiffs' other constitutional claims.

[2] The constitutionality of these sections is not at issue in this appeal.

[3] The district court also held that the Governor could not be enjoined, as an individual, from enforcing the provisions of the law, a holding plaintiffs did not appeal. Appendix B at 32a-34a.

However, in *dicta*, the district court questioned whether the law violated the Establishment Clause and whether certain language in the law is impermissibly vague. Appendix B at 20a-21a & 28a n.7. Because of the court's judgment, the public referendum on whether P.L. 20-134 should be repealed was never held.[4]

Defendant filed a timely notice of appeal. Appendix E. In his appeal, defendant argued that *Roe* does not apply to Guam; he argued in the alternative that P.L. 20-134 is constitutional on its face under the standard of review applicable to abortion statutes, as modified by this Court's decisions in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990); and *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972 (1990) (*Akron Center II*). Defendant argued further that he is not subject to suit under 42 U.S.C. § 1983,[5] and that P.L. 20-134 does not violate the Establishment Clause and is not impermissibly vague. Defendant did not appeal that portion of the judgment declaring the solicitation provisions (§§ 4, 5) unconstitutional. Consequently, no free speech issues are presented here. Likewise, no pregnant woman could be prosecuted for violating the law even if the provisions which are being appealed are allowed to go into effect by this Court.

On April 16, 1992, the court of appeals affirmed the district court's judgment. The court held that the unappealed solicitation provisions are severable from the remainder of the law (Appendix A at 5a-7a); that *Roe v. Wade* applies to Guam (*id.* at 7a-8a); that defendant may be sued for prospective relief under 42 U.S.C. § 1983 (*id.* at 8a-10a); that P.L. 20-134 is unconstitutional under

[4] As the court of appeals noted (Appendix A at 6a n.3), "no issue of ripeness" is presented because "[t]he provision for a referendum did not delay the effective date of the Act."

[5] Defendant did not question the district court's general equitable power to grant prospective relief under 28 U.S.C. § 1331, but only the applicability of 42 U.S.C. § 1983.

Roe (*id.* at 10a-12a); and that *Roe* was not modified by this Court's decisions in *Webster*, *Hodgson*, or *Akron Center II* (*id.* at 12a-15a). Thus, the judgment of the district court permanently enjoining P.L. 20-134 was affirmed. *Id.* at 15a. The court of appeals expressly declined to rule on any of the alternative grounds for affirmance urged by plaintiffs. *Id.* at 15a n.10.

Petitioner seeks review of the court of appeals' judgment that P.L. 20-134 is unconstitutional. Petitioner does not seek review of the court of appeals' judgment that the abortion jurisprudence of this Court applies to Guam, or that he is subject to prospective relief under 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER, IN THIS FACIAL CHALLENGE, GUAM P.L. 20-134 HAS ANY CONSTITUTIONAL APPLICATIONS.

This Petition asks the Court to review Guam P.L. 20-134, which prohibits abortion except (i) in cases of ectopic pregnancy or (ii) in any other pregnancy after implantation if there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair her health. P.L. 20-134, §§ 2, 3. This is the first time since *Roe v. Wade*, 410 U.S. 113 (1973), that the Court has been asked to rule on the constitutionality of a statute that *prohibits* abortion, and does not merely *regulate* its practice. Of necessity, the Petition begins with the Court's recent decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Nos. 91-744, 91-902 (June 29, 1992).

In *Casey*, the Court upheld all of the challenged provisions of the Pennsylvania Abortion Control Act of 1982, as amended, except the requirement of spousal notice. Unlike the statute which is the subject of this Petition, the statutory provisions at issue in *Casey* did not purport

to prohibit abortion.[6] *Roe* was not directly implicated by the Pennsylvania regulations, all of which could have been upheld without overruling *Roe*.

Nevertheless, the Joint Opinion decided to reevaluate *Roe* and adhere to what it variously described as its "central" or "essential" holding—that viability marks the frontier between constitutional and unconstitutional prohibitions of abortion.[7] Invoking principles of *stare decicis*, the Joint Opinion retained the viability component of the otherwise discarded trimester framework and concluded that "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Joint Op. at 36. In contrast to this seemingly absolute approach to the State's ability to prohibit pre-viability abortions, the Joint Opinion stated that "[e]ven the broadest reading of *Roe* . . . has not suggested that there is a constitutional right to abortion on demand," citing *Doe v. Bolton*, 410 U.S. 179, 189 (1973). *Id.* at 45. Thus, it would appear that at least some abortions may be prohibited prior to viability, though this Court has provided little guidance on this point.

Petitioner asks the Court to grant review of the Ninth Circuit's judgment to answers questions that were not directly presented or actually decided in *Casey*, and to resolve other questions of enforcement and regulation that were left in doubt.

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[6] In *Casey*, plaintiffs did not challenge those provisions of the Act which prohibit sex-selective abortions and abortions after twenty-four weeks gestation. Pa. Stat. Ann. tit. 18, §§ 3204(c), 3211 (Purdon 1991). Nevertheless, plaintiffs maintained in this Court that a ban on sex-selective abortions violated *Roe*. Reply Br. at 11 n.20.

[7] *Casey*, Nos. 91-744, 91-902, slip op. at 3-4, 11, 18, 27, 28, 29, 31, 36-37 of Joint Opinion (hereinafter Joint Op.).

Plaintiffs challenged Guam P.L. 20-134 on its face.[8] In a facial challenge, plaintiffs must show that "'no set of circumstances exists under which the Act would be valid.'" *Webster*, 492 U.S. at 524 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). That the Act "'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.'" *Id.*, quoting *Salerno*. *See also Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991); *Akron Center II*, 110 S.Ct. at 2980-81. Rather, plaintiffs must show that the law is "unconstitutional in every conceivable application." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984).

Thus, the threshold question is whether P.L. 20-134 has *any* constitutional applications. Unless *Roe* and *Casey* stand for the proposition that *no* abortions may be prohibited, it clearly does.

For example, Guam could prohibit *some* previability abortions. Generally, these might be characterized as those abortions which are not "necessary." In *Doe*, the Court upheld a state abortion statute which, as modified by the district court, prohibited abortion unless a physician, using his "best clinical judgment," determined that it was "necessary." 410 U.S. at 191-92. This "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Id.* at 192. Although, under *Doe*, the range of factors the physician may consider in determining whether an abortion is "necessary" to a woman's health is very broad, it is not boundless. At least *some* abortions are performed

[8] During the four days the law was in effect, P.L. 20-134 was not enforced against any of the plaintiffs or any of their female patients. Plaintiffs challenged the law on its face, not as it applies to any particular woman seeking an abortion for any specific reason. Alleging that the law is unconstitutional *in toto*, plaintiffs sought declaratory and injunctive relief against the law in its entirety, and not as it may apply under any given set of circumstances.

for reasons which must be considered to be *unrelated* to the woman's health, no matter how broadly "health" is construed. These would certainly include abortions performed because of the unborn child's gender[9] or those

[9] The problem of sex-selective abortion is not a theoretical one. Despite the lack of any nexus to maternal health, some women do request abortion solely because the unborn child is the "wrong" sex. *See, e.g.*, N.Y. Times, Dec. 25, 1988, at 1, col. 1 ("[M]any doctors are providing prenatal diagnoses to pregnant women who want to abort a fetus on the basis of sex alone.") and *id.* at 16, col. 4 ("[E]very one of more than a dozen geneticists interviewed said they regularly receive requests for prenatal diagnosis for sex selection."). *See also*, Elliot, *Abortion for "Wrong" Fetal Sex: An Ethical-Legal Dilemma*, 242 J.A.M.A. 1455 (1979); Fletcher, *Ethics and Amniocentesis for Fetal Sex Identification*, 301 N. Eng. J. Med. 550 (1979); Note, *Sex Selection Abortion: A Constitutional Analysis of the Abortion Liberty and a Person's Right to Know*, 56 Ind. L.J. 281 (1981); *Prenatal Diagnosis for Sex Choice*, 10 Hastings Center Rep. 15, 17-20 (Feb. 1980); *Chorionic Biopsy in Demand to Assess Sex*. 19 Ob.Gyn. News, Aug. 1-14, 1984, at 3, 33.

Moreover, there is evidence that abortion for this reason is gaining in acceptance. *See* Wertz & Fletcher, *Fatal Knowledge? Prenatal Diagnosis and Sex Selection*, 19 Hastings Center Rep. 21 (May/June 1989). "[N]ational surveys in 1973 and 1988 by social scientists and medical and ethics researchers indicate that the percentage of geneticists who approve of prenatal diagnosis for sex selection rose from 1% in 1973 to nearly 20% in 1988." N.Y. Times, Dec. 25, 1988, at 1, col. 1. And some physicians are remarkably candid about their willingness to perform abortions for this reason:

> Dr. Michael A. Roth, an obstetrician in Detroit, said he sees no reason to object to sex selection. He will do prenatal diagnosis or refer patients elsewhere for it, and then do abortions if the women request them. "I have no ethical problems with it, absolutely not," he said. "I think that abortion should be available on demand."

N.Y. Times, Dec. 25, 1988, at 16, col. 4.

At least two states have tried to prohibit this form of sex discrimination through legislation. *See* Ill. Ann. Stat. ch. 38, ¶ 81-26 § 6(8) (Smith-Hurd Supp. 1992); Pa. Stat. Ann. tit. 18, § 3204(c) (Purdon 1991). Enforcement of the Illinois statute has been enjoined. *Herbst v. Daley*, No. 84 C 5602 (N.D. Ill. 1984) (LEXIS, Genfed library, Dist. file).

performed on a woman who has become pregnant for the sole purpose of aborting and selling the unborn child's body parts for experimental purposes.[10]

Moreover, recognizing a right to abortion in such circumstances cannot be reconciled with the Court's understanding of abortion as a "*medical decision*" which calls for the exercise of the professional judgment (not merely the technical skills) of a physician. *Roe*, 410 U.S. at 166 (emphasis supplied). In summarizing its holdings, the Court in *Roe* said, "[f]or the stage prior to approximately the end of the first trimester, the abortion *decision* and its effectuation must be left to the *medical judgment* of the pregnant woman's attending physician." *Id.* at 164 (emphasis supplied). *See also, Colautti v. Franklin*, 439 U.S. 378, 387 (1978) ("the abortion decision in all its aspects is inherently, and primarily, a medical decision").

Unless abortions performed for these and other reasons for which there is no possible health justification are protected by the Constitution, Guam P.L. 20-134 has *some*

[10] Partly in response to public advocacy of the selling of fetal body parts (*see* Nat'l L.J., Dec. 7, 1987, at 1, 32-33), and because of concerns regarding fetal tissue experimentation and research, at least sixteen States have passed laws banning the sale and use for experimental purposes of fetal body parts obtained through induced abortions. *See, e.g.* Mass. Ann. Laws ch. 112, § 12J(a)(IV) (Law. Co-op. 1980) Mo. Rev. Stat. § 188.036 (1992); N.D. Cent. Code § 14-02.2-02 (1991).

As in the case of sex-selective abortions, there is evidence that the fears motivating the passage of this legislation are legitimate:

> Both feminists and medical ethicists worry that, without proper restrictions, women could be coerced into becoming pregnant in order to donate tissue to a loved one. In fact, some women don't need to be coerced at all. On an ABC *Nightline* broadcast, Rae Leith, a woman whose father suffers from Parkinson's disease, said she'd willingly become pregnant and abort if she could donate the fetal tissue to her father. Some diabetic women are said to have considered impregnation in order to produce tissue for self-treatment.

Orenstein, *Health*, Vogue, Oct. 1989, at 298, 300.

constitutional applications, even before viability. A contrary conclusion (*i.e.*, that any reason will suffice) is tantamount to recognizing a right to abortion on demand, which the Court has expressly disavowed. *Roe*, 410 U.S. at 153-55 (rejecting plaintiff's claim that a woman has an "absolute" right to abortion "at whatever time, in whatever way and for whatever reason she alone chooses"); *Doe*, 410 U.S. at 189; *Colautti*, 439 U.S. at 386-87; *Casey*, Joint Op. at 45. That is sufficient to sustain the constitutionality of Guam's law in this facial challenge.

Guam P.L. 20-134 also has constitutional applications after viability. In *Casey*, the Court "confirm[ed]" the power of the State "to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health." Joint Op. at 4; *id.* at 36-37. Section 2 of the Guam law contains exceptions for "those rare circumstances in which the pregnancy is itself a danger to [the woman's] own life or health." Joint Op. at 8.[11] Whether this law *is* constitutional and enforceable with respect to post-viability abortions depends upon the answers to two questions that were not raised or addressed in *Casey* or any other opinion of the Court.

First, may Guam enforce P.L. 20-134 after viability and limit post-viability abortions to those circumstances where there is a "substantial risk" that continuance of the pregnancy would "endanger the life of the mother" or "gravely impair" her health? Second, may Guam require that such abortions be performed only in an approved hospital or adequately-equipped clinic, and upon the concurrence of a second physician that these health risks exist? Guam and other American jurisdictions need

[11] *See also, Planned Parenthood of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476, 484 n.7 (1983), (referring to "those rare situations where there are compelling medical reasons for performing an abortion after viability").

guidance from the Court regarding the scope of the post-viability health exception required by *Roe* and *Doe*, and the extent to which therapeutic abortions may be regulated after viability.

There is considerable confusion as to what the term "health" means in the context of post-viability abortions. In *Doe*, the Court fashioned a definition of "health" to cure a *vagueness* problem in the Georgia abortion statute once the statutory exceptions in the law had been declared unconstitutional.[12] The Court stated: "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." 410 U.S. at 192. However, it is not clear that the *Doe* Court intended the above statement to serve as a definition of the health-related abortions the States must allow after viability. Nevertheless, lower federal courts have consistently relied upon this language to invalidate legislative efforts to limit post-viability abortions.

For example, in *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980), the court struck down a Louisiana statute that allowed post-viability abortions only if they were necessary "to prevent permanent impairment to [the woman's] health." The court stated that "[p]reserving maternal health means more than preventing permanent incapacity," and held that under *Doe*, an exception for temporary incapacity had to be allowed, as well. *Id.* at 196. In *Schulte v. Douglas*, 567 F. Supp. 522 (D. Neb. 1981), *aff'd per curiam, sub nom. Women's Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983), the court declared unconstitutional a statute that prohibited abortion after viability unless the procedure was "necessary to preserve the woman from an imminent peril that substantially en-

[12] *Doe*, 410 at 191-92. *See also Colautti v. Franklin*, 439 U.S. 379, 387 (1979) (in *Doe v. Bolton*, "the Court discussed, in a vagueness-attack context, the Georgia statute's requirement that a physician's decision to perform an abortion must rest upon 'his best clinical judgment' ").

dangers her life or health." The court found that, under *Doe*, the danger could not be limited to those that are "substantial" and "imminent." *Id.* at 525. Finally, in *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986), the Third Circuit noted that "no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus." *Id.* at 298. The court stated in *dicta* that if Pennsylvania had attempted to prohibit post-viability abortions performed for psychological or emotional reasons, such a limitation would have violated *Doe*. *Id.* at 299.

Guam P.L. 20-134 does not allow abortions for "psychological or emotional reasons." Rather, continuance of the pregnancy *itself* must create a "substantial risk" of danger to the mother's life or grave impairment to her health, *i.e.*, there must be a substantial risk of grave *physical* impairment. If the broad definition of "health" in *Doe* applies after viability, as the lower federal courts have held, then the Guam law cannot constitutionally be applied in all instances after viability. On the other hand, if P.L. 20-134's narrower definition *is* constitutionally permissible, then the law may be enforced in all of its applications after viability and it should not have been enjoined, at least with respect to post-viability abortions. The Court should grant the Petition to clarify the law regarding the authority of the States to prohibit post-viability abortions, and to affirm that their authority to do so is real, not illusory.

Assuming that Guam's abortion prohibition has constitutional applications after viability, the Court still needs to determine the degree to which Guam can regulate those abortions that are expressly permitted. Abortions allowed by the law must be performed in an approved hospital or adequately-equipped medical clinic, upon the concurrence of a second physician that the circumstances justifying the abortion exist. P.L. 20-134, § 2. In *Doe*, the Court held a second, concurring physician requirement unconstitutional, but application of such a require-

ment to post-viability abortions has never been addressed by this Court. It would appear to be constitutional, though.[13]

From *Roe* to *Casey*, the Court has rejected the proposition that abortions must be permitted for any reason whatsoever. As a result, Guam P.L. 20-134 has constitutional applications, at least in some circumstances. That is sufficient to withstand a facial challenge. Thus, the court of appeals erred in affirming the district court judgment declaring the law unconstitutional on its face and permanently enjoining its enforcement.

Furthermore, guidance from the Court is necessary and review should be granted to end the uncertainty over whether there is a right to abortion on demand prior to viability, and whether post-viability abortions may be limited to serious physical reasons. In *Casey*, the Joint Opinion acknowledged that "the need for [judicial] review [of state laws affecting abortion] will remain as a consequence of today's decision." Joint Op. at 13. The Court can begin to meet that need by granting this Petition. Neither Guam nor any other American jurisdiction should be required to engage in endless rounds of legislation and litigation to discover which abortions may or may not be prohibited. Since Guam's law prohibits all

[13] A requirement that therapeutic abortions be performed in hospitals or clinics would appear to be constitutional, if limited to post-viability abortions. *See Simopoulos v. Virginia*, 462 U.S. 506, 510-19 (1983). In *Webster*, the Court upheld regulations on the medical determination of whether a particular child is viable and stated that the "testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable—an end which all concede is legitimate—and that is sufficient to sustain its constitutionality." 492 U.S. at 520. Similarly, in *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476 (1983), the Court upheld a second-physician requirement for post-viability abortions because it "reasonably further[ed] the State's compelling interest in protecting the lives of viable fetuses." *Id.* at 486. So too, the requirement of a second-physician concurrence in P.L. 20-134 ensures that viable unborn children are not aborted except for serious medical reasons.

abortions that are not protected by the Constitution, it presents these issues for the Court's review, and a full hearing on the merits is warranted.

II. THE COURT SHOULD GRANT REVIEW TO RE-EXAMINE THE VALIDITY OF VIABILITY AS A MEANINGFUL CONCEPT RELATIVE TO THE STATE'S INTEREST IN PROTECTING UNBORN HUMAN LIFE.

In *Roe*, the Court held that States generally cannot prohibit abortion before the point of viability. *Roe*, 410 U.S. at 163. (Though, as argued in Part I of this Petition, there may be some limited specific circumstances under which pre-viable abortions may be prohibited). It is generally accepted that viability (that time when the child can survive if born prematurely) occurs at about the 24th week of pregnancy. Thus, according to *Roe*, an unborn child may be aborted throughout roughly the first six months of pregnancy. The Joint Opinion in *Casey* reaffirmed this holding. Joint Op. at 3-4, 36.

As set forth in greater detail below, however, the Court has never satisfactorily explained its reasons for choosing the point of viability as the time when the State's interest in protecting the lives of unborn children becomes sufficiently compelling to allow abortion to be prohibited. Despite the Court's recent reaffirmation of the viability concept in *Casey*, Petitioner respectfully requests that the Petition be granted to allow the Court to examine more carefully the validity of *Roe's* reliance on viability. Petitioner believes that he is justified in making this request for three reasons.

First, it was unnecessary for the Court to decide this issue in *Casey* because none of the challenged provisions drew it into question. Thus, the Court's statements with respect to viability in *Casey* may be considered by some courts as *dicta*. Accordingly, it would have been preferable for the Court to follow Justice O'Connor's admonition in *Webster*. There, Justice O'Connor declined to reexamine *Roe* stating:

> When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. *And to do so carefully.*

492 U.S. at 526 (emphasis supplied). When the Court reaches out to decide an issue that has not been briefed or argued in the case before it, it is more likely to reach an erroneous result due to the lack of an adequate factual record and the lack of well-developed legal arguments.

Second, the Joint Opinion correctly notes that ultimate public acceptance of a decision depends upon its principled justification. It further notes that "[b]ecause not every conscientious claim of principled justification will be accepted as such, the justification must be beyond dispute." Joint Op. at 23. Accordingly, the Joint Opinion continues: "[t]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures." *Id.* Public acceptance of the validity of the viability criterion can be obtained only upon a full and fair evaluation of its merits.

Finally, if the Court determines that a principled justification for the viability concept cannot be found, then this aspect of *Roe*, like the other aspects of the trimester framework, should be abandoned. Petitioner then would be allowed to enforce the Guam abortion law to a fuller extent than would presently appear possible.

A. The Court has not Yet had an Opportunity to Examine Fully and Fairly the Validity of the Viability Concept. Nor has the Court Provided A Principled Justification for it Sufficient to Achieve Public Acceptance of it.

The issue of whether viability represents a meaningful point at which to find that the State's interest in protecting prenatal life is compelling has never been extensively briefed or argued by the parties in any case before the

Court, including *Roe* [14] and *Casey*.[15] Because of this, the Court has never had an opportunity to evaluate carefully the significance of viability, if any, or to provide a principled justification for its application which is "beyond dispute."

The fact that this issue has never been throughly examined and tested against competing legal argumentation, is particularly troubling since the Joint Opinion finds that "*Roe's central* holding [is] that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." Joint Op. at 18. (emphasis supplied).

Moreover, the *Casey* Joint Opinion provides little defense for selecting viability beyond quotation of the brief statements contained in *Roe*. And, in doing so, it fails to convey a conviction that *Roe's* reliance upon viability is principled "beyond dispute." Joint Op. at 23. Not only is the issue treated in four scant paragraphs of the 73 page Joint Opinion, but the equivocal nature of the statements contained therein suggests a deep-seated unease over the correctness of viability as an appropriate or principled dividing line.

In its brief treatment of the issue, the Joint Opinion refers to the viability line as "seem[ingly] somewhat arbitrary." *Id.* at 27. The Joint Opinion also states that "there is no line other than viability which is *more work-*

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[14] In *Roe*, neither party briefed or argued the concept of viability as a logical point at which to find the State's interest in protecting prenatal life "compelling." Appellant specifically disavowed reliance on any point during pregnancy beyond which abortion could be prohibited and relied, instead, on birth as the proper dividing line. *Roe*, at 153. The State argued that its interest was compelling from conception forward, *Roe*, 410 U.S. at 156.

[15] Only two sentences in the Pennsylvania Attorney General's brief of almost 120 pages even refer to viability and these point out that it is an arbitrary concept. Brief for Respondents in *Casey* at p. 111. The Petitioner's brief of 62 pages contains just one paragraph with five sentences. Brief for Petitioner, at pp. 28-29.

able," implying, at least, that viability is not entirely workable. *Id.* at 28 (emphasis supplied). Finally, the Joint Opinion appears to suggest that not all of its authors believe that viability was a justifiable dividing line when *Roe* was decided.

> We do not need to say whether each of us, had we been Members of the Court when the valuation of the State's interest [in protecting prenatal life] came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.

Id. at 29.

Given the limited explanation which has been provided to date by the Court in justification of the viability concept, and the centrality of that issue to the holding of *Roe*, the Court should grant this Petition. This would allow the validity of viability as a principled line of demarcation to be carefully examined with the benefit of briefing and argument by both parties to this dispute.

B. Neither of the Reasons, Given in *Casey*, for Adhering to the Viability Concept is Sufficient to Justify such Adherence.

In *Casey*, the Joint Opinion provides two reasons for adhering to *Roe's* selection of viability as the point when the State's interest in protecting prenatal life becomes sufficiently compelling to override the woman's liberty interest. First, the Joint Opinion invokes the principle of *stare decisis*. Since "*Roe* was a reasoned statement, elaborated with great care [, and has] twice [been] reaffirmed in the face of great opposition," Joint Op. at 27-28, citing *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron Center I*), the Joint Opinion states that *stare decisis* requires that it be followed. The second reason given is "that the concept of viability . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the

independent existence of the second life can in reason and all fairness be the object of a state['s] protection that now overrides the rights of the woman." *Id.* at 28. Neither of these reasons is sufficient to constitute a principled justification for clinging to the viability concept of *Roe*.

1. *Stare decisis.* Whether one examines the concept of viability under the general approach to *stare decisis* or according to the more specific approach set forth in the Joint Opinion, adherence to viability does not appear warranted.

a. *General Approach.* First, it is simply inaccurate to conclude that *Roe's* viability determination was "elaborated with great care," or that the Court's rationale for choosing viability was twice reaffirmed.[16]

The Texas statute at issue in *Roe* did not set viability as the point at which abortions could be prohibited. Nor did Texas argue that its interest in protecting prenatal life was more substantial at viability than it was at conception. Similarly, the Appellants in *Roe* did not argue that the State's interest became compelling at viability. Rather, they argued that the woman's right to abort continued up until birth; only at that point could the State's interest be considered compelling. Thus, neither of the parties in *Roe* appears to have attached any significance to the point of viability. In light of this, the Court's reference to viability as the point at which abortions could be prohibited was unnecessary to a determination of whether Texas could prohibit virtually all abortions as provided by its statute.[17]

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[16] The majority opinion in *Thornburgh* and *Akron* stated, in conclusory fashion, that they reaffirmed *Roe* on the basis of *stare decisis*. However, neither opinion expressly defends the rationale upon which the choice of viability was made.

[17] It might have been logical to reach this issue if the Court had intended to treat the matter as a facial challenge and enjoin it only in its impermissible applications. However, since the Court enjoined it in its entirety, there appears to have been no need to address this issue in *Roe*. *See Roe*, 410 U.S. at 177-78 (Rehnquist, J., dissenting).

Moreover, *Roe's* treatment of viability is truncated, at best. After acknowledging that the State has an "important and legitimate interest in protecting the potentiality of human life," *Roe* states that this interest "grows in substantiality as the woman approaches term and, at a point during pregnancy,[] becomes 'compelling.'" *Roe*, 410 U.S. at 162-163. No satisfactory explanation as to *why* this might be so can be found in *Roe*.[18] The full extent of the explanation for choosing viability as the point when the state's interest becomes compelling is contained in three short sentences.

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.

Roe, 410 U.S. at 163.

Perhaps the most persuasive criticism of the "logical and biological justifications" of *Roe's* viability concept may be found in Justice O'Connor's dissent in *Akron Center I*:

> In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The

[18] Justice Stevens, in *Thornburgh*, attempts to provide some greater explanation by stating that it is "obvious that the State's interest in the protection of an embryo increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day." 476 U.S. at 778. Justice Stevens' proposal that the State's interest in protecting the unborn's child's life must increase as he or she develops, however, cannot be correct. If it were correct, then the State's interest in protecting the newborn as well as the mentally incompetent and disabled would be less than its interest in protecting competent adults who are arguably better capable of interacting with society, experiencing pleasure and reacting to their surroundings. Such a notion is clearly contrary to existing laws and principles of equality under the law.

> difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult questions of when life begins," *id.*, at 159, the Court chose the point of viability—when the fetus is *capable* of life independent of its mother—to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.

Akron, 462 U.S. at 460-461 (emphasis in original).

b. *Specific approach.* Part III of the Joint Opinion sets forth four separate criteria for determining whether the doctrine of *stare decisis* precludes reconsideration of *Roe*. An examination of the viability concept under each of these demonstrates that it need not be adhered to according to *stare decisis* principles.

i. The first of these criteria is "workability." Although the Joint Opinion did not find *Roe* to be "unworkable," neither does it specifically examine the concept of viability under this criterion, nor does it explain how viability is a workable concept. As explained below, viability does not appear to be "workable" either as a legitimate choice for balancing the competing interests of the woman and the state or for purposes of enforcement.

As a practical matter, whether a particular unborn baby is "viable" depends not only on advances in neonatal care, but also on advances in medical technology that enable physicians to assess accurately fetal age, weight, and lung maturity—factors which must be taken into consideration in estimating the baby's chances of survival if removed from the womb. In addition, viability presumably depends on the availability of such technology within a particular community. Finally, it also depends on the skill of those utilizing such techniques. For example, the accuracy of an ultrasound determination of

gestational age may depend on the quality of the machine as well as the skill of the technician. In the final analysis, then, whether a particular baby is "viable" depends on all of these factors and also on the skill of the physician who must use his best medical judgment based upon the available technology and data to *estimate* the baby's chances for survival. Even with due diligence, a significant margin of error can be expected. As the Court noted, in *Webster*, the district court "found that there may be a 4-week error in estimating gestational age." 492 U.S. at 516.

It is clear that the skill of doctors who perform abortions near the time of viability varies considerably and that many children who are aborted survive these procedures. This indicates that a significant number of erroneous judgments are made. An article in the *Philadelphia Inquirer* stated that Dr. Willard Cates, then Chief of Abortion Surveillance for the Center for Disease Control, "estimates that 400-500 abortion live-births occur every year in the United States." *Philadelphia Inquirer*, Aug. 2, 1981 (Magazine) at 14. As the article notes, this "means that these unintended live births are literally an everyday occurrence." *Id.*

Today, there may be fewer live births due to the fact that dilation and evacuation (D&E) is more commonly used up until the 24th week of pregnancy,[19] and even thereafter by some.[20] This procedure involves the dismemberment of the unborn child within the womb followed by the removal of the child's body parts. Although a D&E abortion is almost always fatal to the child, a recent report in The New York Times told of a baby, Ana Rosa

[19] One claimed advantage of D&E over instillation methods is that the woman does not have to "experience the expulsion of the fetus, which may or may not have signs of life." Hern, *Abortion Practice* at 133 (1984).

[20] In *Planned Parenthood v. Ashcroft*, the Court noted that one doctor "supported the use of D&E on 28-week pregnancies, well into the third trimester." 462 U.S. 476, 483 n.7 (1983).

Rodriguez, who survived an attempted abortion, albeit without one of her arms which was severed during the procedure. N.Y. Times, Nov. 26, 1991, at A. 12.

From the foregoing, it is clear that the determination of whether a particular baby is "viable" is, at best, an imprecise medical judgment—one that many would describe as based only on a physician's "educated guess."

Moreover, reliance on viability as the constitutional benchmark for balancing the woman's liberty interest and the State's interest in protecting the baby's life is wholly arbitrary from the perspective of the woman, the child and the State. This is true because the determination of whether a baby is or is not "viable" may differ solely as a result of the skill of the examining physician whom the woman chooses and the technology available in location where the abortion is sought. Thus, the woman's "liberty" interest has no consistent protection.

Also, regardless of these factors, the baby's status remains the same. Therefore, the State's interest in protecting the baby's life remains the same. And, if an erroneous determination is made, the State's and the baby's interests would be violated. Likewise, the woman's liberty interest would appear to be unequally protected. For example, if one woman's physician is more skilled at determining gestational age, she may be prevented from obtaining an abortion. In contrast, another woman whose physician is less skilled may be allowed to have an abortion even though her baby is equally capable of surviving outside the womb. There is no apparent reason why this should be so. Thus, viability appears to be arbitrary and, therefore, unworkable.

Additionally, if *Roe* had simply selected a specific point in pregnancy (*e.g.*, 24 weeks, which corresponded roughly to its choice of viability) after which States could prohibit abortion, its ruling would have been "more workable" for purposes of enforcement. However, as it stands, the Court

has prevented the States from relying on any "bright lines" regarding viability. *Colautti v. Franklin*, 439 U.S. 379, 388-389 (1979) (States may not rely on any single factor to determine viability). Thus, they have been deprived from adopting any statutory cutoff for abortion which is subject to meaningful enforcement capability.[21]

ii. "Reliance" is the second criterion set forth in the Joint Opinion for determining whether *stare decisis* requires adherence to the viability standard. The Joint Opinion seems to acknowledge that "reliance" on the right to abortion might be difficult to justify because "reproductive planning could take virtually immediate account of any sudden restoration of State authority to ban abortions." Joint Op. at 14. However, the Court determines that the "reliance" theory does apply to the right to abortion, generally, because abortion is available in cases of contraceptive failure, *id.*, and "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.*

However coherent this reasoning may be with respect to maintaining the availability of early abortions, it cannot apply with equal force to abortions near the point of viability. Certainly women could maintain their economic and social status by obtaining early abortions rather than waiting until late in pregnancy. Thus, it cannot be said that women must "rely" on the availability of late-term

[21] Prosecutions under this basically standardless definition of viability have proven to be virtually impossible. In order to enforce a prohibition on abortion after viability, the State must generally prove that the abortionist acted in bad faith, not simply negligently, in erroneously determining gestational age. For insight into other prosecutorial problems, *see*, *Floyd v. Anders*, 440 F. Supp. 535, 537 (D. S.C. 1977), *vacated* and *remanded*, 440 U.S. 445 (1979) (state prosecuting attorney was enjoined from attempting to prosecute a physician for performing an abortion on a woman who was 25 weeks pregnant where baby survived for 20 days and abortion was sought because the pregnant woman "wished an abortion because her expectancy interfered with her hopes and plans to go to college.")

abortions in order to "control their reproductive lives." Indeed, even if this could be argued, it would not seem logical to suggest that such reliance is more significant just prior to viability than just after viability. Therefore, a "reliance" interest in the context of a "viability" argument seems irrelevant.

iii. Application of the third criterion of the Joint Opinion requires that viability be examined according to the "evolution of legal principle." According to this test, if the law upon which *Roe's* doctrinal footings for choosing viability rests is weaker now than it was in 1973, then *stare decisis* should not preclude abandoning the viability concept. Joint Op. at 14. In *Roe*, the Court rejected the State's claim that its interest in protecting prenatal life was compelling throughout pregnancy. It appears to have done so, in part, based upon its observation that "the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. *Roe*, 410 U.S. at 161. Although the *Roe* Court acknowledged that recovery was generally available for prenatal injuries under tort law, it noted that "[i]n most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained." *Id.*

The foregoing statement appears to represent the full extent of the *Roe* Court's legal moorings for selecting viability as the determinative point for allowing States to provide prenatal protection. Whatever logic underlies this notion, it is clear that the legal landscape regarding the protection of unborn children has changed drastically since *Roe* was decided. Judicial and legislative developments in areas of the law (other than abortion) have increasingly recognized that viability is not a relevant criterion in defining public wrongs (criminal law)[22] or

[22] *See e.g.*, Ill. Rev. Stat. ch. 38, § 9-1.2, 9-2.1, 9-3.2, 12-2.1, 12-4.4 (1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against un-

redressing private injuries (tort law).[23] Thus, this prong of the *stare decisis* test would not support reaffirmation of the viability concept.[24]

iv. The final criterion for determining whether *stare decisis* counsels reaffirmation of *Roe*, is whether *Roe's* factual assumptions are unsound. Joint Op. at 17. To the extent that *Roe* appears to have relied on any facts to support its choice of viability, it would seem that the Court relied upon the following "facts."

First, the Court appears to have determined that the State's interest which was really at issue was an interest in protecting "potential life," not an interest in protecting "actual life." *Roe*, 410 U.S. at 150-152. Second, although *Roe* claims not to have decided the "difficult question of when life begins," the Court's first reference to viability is in a discussion of the various views on when life does begin. *Id* at 160-161. It is here that the Court notes that the common law seems to have placed the beginning of life at quickening, but then states:

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born child, regardless of gestational development); Minn. Stat. §§ 609.2661(1), 609.2662(1) 1988 (same); N.D. Cent. Code § 12.1-17.1-02 through 12.1-17.1-06 (Supp. 1991) (same); Challenges to such statutes uniformly have been rejected. *See, e.g., People v. Ford*, 221 Ill. App. 3d 354, 581 N.E.2d 1189 (1991); *Brinkley v. State*, 253 Ga. 541, 322 S.E.2d 49 (1984); *Smith v. Newsome*, 825 F.2d 1386 (11th Cir. 1987); *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990).

[23] *See e.g., Pressley v. Newport Hosp.*, 117 R.I. 177, 188, 365 A.2d 748, 753-54 (1976) (rejecting viability test in allowing recovery for stillborn infants under state wrongful death statute); Ill. Rev. Stat. ch. 70, § 2.2 (recognizing cause of action for wrongful death regardless of when injuries inflicted or when death occurs).

[24] It is noteworthy that in evaluating *Roe* under this criterion, the authors of the Joint Opinion appear to concede that this prong of *stare decisis* does not support reaffirmation of the viability concept for they state: "Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty." Joint Op. at 16.

> [P]hysicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid.

Id at 160. Thus in settling upon viability as the significan point at which the State's interest in protecting prenatal life becomes compelling, the Court appears to have found as "fact" that "life" does not begin until viability. That some in the medical community at the time of *Roe* treated the unborn child as a mere appendage of the mother and not as a separate patient seems to have informed the Court's thinking on this point.

However, neither of these "facts" upon which *Roe's* reliance on viability depends is true today. First of all, it is clear that modern prohibitions are founded, not on an interest in protecting *potential* life, but rather on an interest in protecting the *actual* life of the unborn child. *See, e.g.*, Pa. and Guam legislative findings. Pa. Cons. Stat. Ann. sec. 3202(a) (Purdon 1991); P.L. 20-134, sec. 1.

Moreover, whatever can be said of the medical community's treatment of the unborn child at the time of *Roe*, it is clear that modern obstetrical medicine recognizes the unborn child as a second patient throughout pregnancy; not as a mere appendage of the mother. For example, the most current edition of *Williams Obstetrics*, a leading obstetrical text, states:

> Obstetrics is an unusual specialty of medicine. Practitioners of this art and science must be concerned simultaneously with the lives and well-being of two persons; indeed, the lives of two who are interwoven.

Cunningham, MacDonald & Gant, *Williams Obstetrics*, vii (18th ed. 1989) (emphasis added). In a chapter entitled "Techniques to Evaluate Fetal Health, it continues:

> Until relatively recently, the intrauterine sanctuary of the fetus was held to be inviolate. The mother was

> the patient to be cared for; the fetus was but another albeit transient, maternal organ . . . Indeed, the fetus is no longer regarded as a maternal appendage ultimately to be shed at the whim of biological forces beyond control. Instead, the fetus has achieved the status of the second patient, a patient who usually faces much greater risks of serious morbidity and mortality than does the mother.

Id. at 277.

Finally, with respect to *Roe's* apparent mistaken notion that the unborn child is not alive prior to viability, it can only too readily be proven by modern medical technology that the unborn child is alive and kicking before viability, as well as after viability.

> Although the fetus starts making spontaneous movements at about seven weeks after conception, mothers do not usually feel their babies moving until about 16 to 21 weeks. The types of movements the fetus makes include slow squirmy movements, sharp kicks, and small rhythmic kicks. The squirming tends to increase during pregnancy, while the rhythmic kicks continue at a constant rate from the fifth to ninth month. The sharp kicks increase up to the seventh month and then diminish.

Valman & Pearson, *What the Fetus Feels*, 1980 Brit. Med. J. 233, 234; *see also*, Affidavit of Douglas Eaton, M.D. (filed in the District Court in this matter) containing detailed description of fetal development including heartbeat, brain waves, etc.

From the foregoing discussion, it is clear that significant arguments can be made to demonstrate that adherence to *Roe*'s viability concept should not be based on *stare decisis*.

2. *Reason and Fairness.* The Joint Opinion notes that at viability, there is a realistic possibility that the unborn child can survive if removed from the womb. It then suggests that due to "the independent existence of the second life" at viability, "reason and all fairness" support

recognition of the State's interest in protecting prenatal life at this stage in pregnancy. Joint Op. at 28. Neither "reason" nor "fairness," however, supports the destruction of unborn children up until the time when they are adjudged to be "viable," but not thereafter.

First, the concept of viability appears entirely irrelevant in the context of abortion. The child's capacity to survive outside the womb is undoubtedly relevant when one is contemplating *removing* the child from the womb and one is concerned about the safety of the child if this is done. That capacity seems entirely irrelevant, however, when the point of viability marks only the time at which the child can no longer be removed from the womb. Second, when viability is reached, the baby presumably will not have "independent existence" because the abortion cannot take place. Thus, the viable unborn child is as physically dependent upon her mother for the same nourishment as is the unborn child who is not yet viable. Accordingly, adherence to viability is not supported by "reason."

Moreover, the viability concept does not appear to be at all "fair" to the many children who are killed through abortion. Nor is it "fair" to those children who survive abortion but are damaged by the procedure—either by having their limbs severed or by being blinded by the caustic solutions which are intended to cause their death but fall short of doing so.

Presumably these children, once aborted would be considered "persons" who are entitled to protection from further abuse. But why they were not considered sufficiently worthy of protection when their injuries were inflicted upon them is beyond all reason.

CONCLUSION

Petitioner respectfully requests that the petition for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit be granted, so that the important federal questions raised herein may be resolved.

Respectfully submitted,

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July 15, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-16706

D.C. No. CV-90-00013-ARM

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS; GUAM NURSES ASSOCIATION; THE REVEREND MILTON H. COLE, JR.; LAURIE KONWITH; EDMUND A. GRILEY, M.D.; WILLIAM S. FREEMAN, M.D.; JOHN DUNLOP, M.D.; on behalf of themselves and all others similarly situated, and all their women patients,
Plaintiffs-Appellees,

v.

JOSEPH F. ADA, GOVERNOR OF GUAM,
in his official capacity,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Guam
Alex R. Munson, Chief Justice, Presiding

Argued and Submitted
November 4, 1991—Honolulu, Hawaii

Filed April 16, 1992
Amended June 8, 1992

ORDER AND AMENDED OPINION

Before: Herbert Y. C. Choy, Dorothy W. Nelson and William C. Canby, Circuit Judges.

Opinion by Judge Canby

Paul B. Linton, Americans United for Life, Chicago, Illinois; Arnold H. Leibowitz, Cameron & Hornbostel, Washington, D.C., for the defendant-appellant.

Anita P. Arriola, Arriola, Cowan & Bordallo, Agana, Guam, for the plaintiffs-appellees.

ORDER

It is ordered amending the caption of the opinion filed April 16, 1992, to read as set forth above.

OPINION

CANBY, Circuit Judge:

On March 19, 1990, the Territory of Guam enacted a statute ("the Act") outlawing almost all abortions.[1] The

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[1] The final version of Guam Public Law 20-134 states:

BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

Section 1. Legislative findings. The Legislature finds that for purposes of this Act [the] life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development.

Section 2. § 31.20 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

only exceptions were abortions in cases of ectopic pregnancy, and abortions in cases where two physicians practicing independently reasonably determined that the

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§ 31.20. Abortion: defined. "Abortion" means the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus. "Abortion" does not mean the medical intervention in (i) an ectopic pregnancy, or (ii) in a pregnancy at any time after the commencement of pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother, any such termination of pregnancy to be subsequently reviewed by a peer review committee designated by the Guam Medical Licensure Board, and in either case such an operation is performed by a physician licensed to practice medicine in Guam or by a physician practicing medicine in the employ of the government of the United States, in an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam.

Section 3. § 31.21 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

§ 31.21. Providing or administering drug or employing means to cause an abortion. Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to cause an abortion of such woman as defined in § 31.20 of this Title is guilty of a third degree felony. In addition, if such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action.

Section 4. § 31.22 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

§ 31.22. Soliciting and taking drugs or submitting to an attempt to cause an abortion. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an

pregnancy would endanger the life of the mother or "gravely impair" her health. All other abortions were declared to be crimes, both on the part of the women submitting to the abortions and on the part of the persons procuring or causing them.

The validity of the Act was immediately challenged in this class action brought by the Guam Society of Obstetricians & Gynecologists and others against Joseph F. Ada, the Governor of Guam. The district court accurately viewed the Act as a direct challenge to the regime of *Roe v. Wade*, 410 U.S. 113 (1973), in the Territory of Guam. The district court held that *Roe v. Wade* ap-

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abortion as defined in § 31.20 of this Title is guilty of a misdemeanor.

Section 5. A new § 31.23 is added to Title 9, Guam Code Annotated, to read:

§ 31.23. Soliciting to submit to operation, etc., to cause an abortion. Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor.

Section 6. Subsection 14 of Section 3107, Title 10, Guam Code Annotated, is repealed.

Seciton 7. Abortion referendum, (a) There shall be submitted at the island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the question to appear on the ballot in English and Chamorro:

"Shall that public law deprived from Bill 848, Twentieth Guam Legislature (P.L. 20-[134]), which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?["]

In the event a majority of those voting "Yes," such public law shall be repealed in its entirety as of December 1, 1990.

(b) There is hereby authorized to be appropriated to the Election Commission (the "Commission") sufficient funds to carry out the referendum described in this Section 7, including but not limited to the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.

plied, and granted summary judgment for the plaintiffs, permanently enjoining enforcement of the Act.[2] We affirm.

I

The plaintiffs in this case are the Guam Society of Obstetricians & Gynecologists; the Guam Nurses Association; physicians Edmund A. Griley, William S. Freeman, and John Dunlop; the Reverend Milton H. Cole, Jr.; and Laurie Konwith. The health care providers in this group clearly have standing to bring this action. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Abele v. Markle*, 452 F.2d 1121, 1125 (2d. Cir. 1971). Because some of the plaintiffs have standing, it is not necessary to determine whether the others do. *See Doe v. Bolton*, 410 U.S. 179, 188-89 (1973); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

The district court held that the plaintiff could maintain their action under 42 U.S.C. § 1983, and awarded them relief under the due process guarantees recognized in *Roe v. Wade*. The court determined that those guarantees applied in Guam, under the provisions of the Mink Amendment to the Guam Organic Act, 48 U.S.C. § 1421b(u). The Territory of Guam in the person of Governer Ada ("Guam") challenges all of these rulings on appeal, and urges as well that the authority of *Roe v. Wade* has been undermined by later decisions of the Supreme Court. Before we address these points, however, we must deal with a threshold issue raised by the plaintiffs.

A. *Severability of the Unappealed Sections*

The district court held that Sections 4 and 5 of the Act violated the First Amendment, and Guam did not appeal

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[2] The district court also held that Section 4 and 5 of the statute, which make criminal the "soliciting" of abortions, violated the First Amendment. That ruling has not been appealed.

from that ruling. The plaintiffs now argue that these sections are not severable from the remainder of the Act. The result, they contend, is that the entire Act has been invalidated, in effect, by the district court's unappealed ruling, leaving nothing to be decided on this appeal. We reject this contention because we conclude that Sections 4 and 5 are severable from the other parts of the Act.

> The standard for determining the severability of an unconstitutional provision is well established; " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' "

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (citations omitted). The sections of the Act that remain if Sections 4 and 5 are severed clearly are fully operative as a law. Unless there is evidence of contrary legislative intent, the remainder of the Act should therefore survive the invalidation of Sections 4 and 5.

The plaintiffs put forward two related arguments suggesting a legislative intent against severability. First, they contend that Section 7, which provides for a referendum to determine whether the entire Act should be repealed,[3] demonstrates that the Guam Legislature intended the Act to stand or fall as a whole. Second, they argue that the Legislature's intention was to pass a comprehensive antiabortion statute, and that removal of Sections 4 and 5 creates a weaker and less comprehensive statute.

With respect to the first argument, the fact that there was to be a referendum on the entire Act reveals very little about legislative intent regarding severability. The plaintiffs place undeserved emphasis on the words "in its entirety." That part of the section provides that, if a

[3] The provision for a referendum did not delay the effective date of the Act. There is accordingly no issue of ripeness.

majority of the voters vote to repeal the law, "such public law shall be repealed in its entirety." An entire repeal is the obvious and logical result of a vote to repeal in a referendum; the words in question signify no more than that.

While the plaintiffs' second argument is not wholly implausible, they present no evidence to support it. The mere suggestion that legislators wanted a comprehensive Act is not sufficient to overcome the presumption of severability that is implicit in the *Alaska Airlines* standard. We therefore reject the plaintiffs' severability arguments, and proceed to the arguments that Guam raises on appeal.

B. *Applicability of Roe v. Wade to Guam*

Guam contends that the substantive due process guarantee enforced in *Roe v. Wade* and subsequent abortion cases does not apply to Guam because nothing in Guam's Organic Act, codified at 48 U.S.C. §§ 1421-1428 (1988), so provides. The plain language of the 1968 Mink Amendment to the Organic Act, codified at 48 U.S.C. § 1421b(u) (1988), belies their claim. The Mink Amendment states that:

> The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam . . . and shall have the *same force and effect there as in the United States or in any State* of the United States: . . . the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

48 U.S.C. § 1421b(u) (emphasis added). The Mink Amendment thus expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which

the holding of *Roe* was founded.[4] *See Roe v. Wade*, 410 U.S. at 153.

It may be true, as Guam argues, that the Supreme Court requires a clear indication of congressional intent before interpreting a congressional action as extending a right to the people of Guam. *See Guam v. Olsen*, 431 U.S. 195 (1977). We can scarcely imagine, however, any clearer indication of intent than the language of the Mink Amendment: the relevant constitutional amendments "have the same force and effect" in Guam as in a state of the United States. There is no need, therefore, to go further. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 186-87 (1990) (resorting to legislative history only after determining that the statutory language was unclear). Accordingly, we hold that *Roe v. Wade* applies to Guam as it applies to the states.[5]

C. *Prospective Relief Under 42 U.S.C. § 1983*

Guam next argues that the plaintiffs cannot maintain this action against Governor Ada under 42 U.S.C. § 1983 because he is not a "person" within the meaning of that statute. We hold that he is a "person" when sued in his official capacity for prospective relief.

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[4] The Mink Amendment also extends to Guam every other conceivable constitutional source of the right of privacy. *See Roe*, 410 U.S. at 152 (sources relied on by the Count or individual Justices have included the First Amendment, the Fourth and Fifth Amendments, the penumbra of the Bill of Rights, the Ninth Amendment, and the Fourteenth Amendment).

[5] Our disposition of this question on the basis of the Mink Amendment makes it unnecessary for us to address the further contention of the plaintiffs that the right of privacy-autonomy protected by *Roe v. Wade* qualifies as a "fundamental" constitutional right applicable to an unincorporated territory by its own force. *See, e.g., Examining Board v. Flores de Otero, 426 U.S. 572, 599 n.30 (1976)* (only *"fundamental" constitutional rights apply in unincorporated territory).*

Section 1983 creates liability for "persons" who, while acting "under color" of state or territorial law, deprive citizens or other persons of rights, privileges, or immunities secured by the Constitution or federal law. 42 U.S.C. § 1983. In *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990), an action for damages, the Supreme Court held that territories are not "persons" within the meaning of § 1983. The Court also stated: "[p]etitioners concede, . . . and we agree, that if Guam is not a person, neither are its officers acting in their official capacity." *Id.* at 192. Guam seizes upon this language. It contends that, because Governor Ada is being sued to prevent him from enforcing a statute of Guam, he is necessarily being sued in his official capacity. Therefore, Guam asserts, he cannot be considered a "person" subject to suit under section 1983.

Guam's argument overlooks the distinction between suits against governmental officials for damages, such as *Ngiraingas*, and those for injunctive relief. The distinction has been spelled out in cases involving state officials. Like territories, states are not "persons" for purposes of section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-65 (1989). In addition, state officers, when sued for damages in their official capacities, are likewise not "persons" within the meaning of 1983. *Id.* at 71. Any other conclusion would render meaningless the ruling that states are not "persons"; a judgment against a state official in his or her official capacity runs against the state and its treasury. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

The rule is entirely different, however, when the suit is for injunctive relief. "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 491 U.S. at 71 n.10 (quoting *Kentucky v. Graham*, 473 U.S. at 167 n.14); *see Ex parte*

Young, 209 U.S. 123, 159-60 (1908). We can see no reason why the same distinction between injunctive and damages actions against officials should not apply to a territory.

Guam attempts to distinguish *Will* by arguing that Guam is a "federal instrumentality" rather than a sovereign entity like a state. Because Congress maintains control over the Territory, Guam contends that there is no need to apply § 1983 to Guam or its officials.

Guam's argument proves too much. Under its approach, section 1983 would not apply at all in any territory—not even to municipalities or officials acting in their individual capacities. Such a result would totally nullify the provision of section 1983 imposing liability upon persons acting under color of law of "any State *or Territory*." Accordingly, we conclude that Governer Ada, when sued as he is here in his official capacity for injunctive relief, is a person within the meaning of 42 U.S.C. § 1983.

II

Having determined that the plaintiffs may maintain this action under section 1983, we turn to the substantive due process claim. Two issues arise: (1) whether Guam's Act violates the right of privacy protected by *Roe v. Wade*, and (2) whether subsequent Supreme Court decisions, particularly *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), have so eroded *Roe v. Wade* that *Roe* cannot now be applied to invalidate Guam's Act.

A. *Validity of the Act under Roe v. Wade*

The first issue is not hard to resolve. Guam's Act makes no attempt to comply with *Roe*. In *Roe*, the Supreme Court recognized that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," and that for the

state to deny this choice "may force upon the woman a distressful life and future," along with other harms. *Roe*, 410 U.S. at 153. The Court further recognized that limitation of the woman's fundamental right of choice could be justified only by a "compelling state interest." *Id.* at 155.

The Court in *Roe* rejected the state's argument, renewed by Guam here, that the state has a compelling interest in protecting fetal life from the moment of conception. *Id.* at 159. Thus *Roe* recognized the superior right of choice by the woman during the first trimester of pregnancy, and her right during the second trimester limited only by the state's compelling interest in protecting her health. *Id.* at 163. Only after the point of viability did the state's interest in fetal life become compelling and permit the state to proscribe abortion entirely. *Id.* at 163-64.

The Guam Act gives not a nod toward *Roe*. With two narrow exceptions, it simply negates the rights and interests of the pregnant woman and forbids her to terminate her pregnancy from the moment of conception. It is difficult to imagine a more direct violation of *Roe*. Even the exceptions for abortion to save the mother's life or to prevent grave impairment to her health are hedged with crippling restrictions. The pivotal determination must be made by two physicians "who practice independently of each other"; they must make their determination "using all available means," and subject to subsequent review by a peer review committee. Act, 9 Guam Code Ann. § 31.20. Less cumbersome two-physician and peer review requirements were struck down by the Supreme Court in *Doe v. Bolton*, 410 U.S. 179, 199-200 (1973), decided with *Roe*, and in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 768-71 (1986).

If the core of *Roe* remains good law, then, the Act is clearly unconstitutional. Guam contends, however, that subsequent decisions have so eroded the analysis of *Roe*

that Guam's Act should be held to be constitutional under the current state of the law. We now address that contention.

B. *The Status and Applicability of Roe Today*

Guam contends that *Roe* has no force after *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). Putting *Webster* together with non-majority opinions in other cases, Guam contends that the classification of competing interests has changed. Guam relies particularly upon Justice O'Connor's dissents in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 814, and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983). According to Guam, five Justices of the Supreme Court now recognize the state's compelling interest in potential human life throughout pregnancy, and no longer adhere to the *Roe* analysis. In *Webster*, a three-Justice plurality stated that it did "not see why the State's interest in protecting potential human life should come into existence only at the point of viability." *Webster*, 492 U.S. at 519. It also characterized the woman's interest as a "liberty interest," as distinguished from a "fundamental right." *Id.* at 520. Guam would put these statements together with Justice Scalia's view that *Roe* should be overruled. *Id.* at 532. It would then add Justice O'Connor's view that regulations that do not impose an "undue burden" on a woman's right to seek an abortion are sustainable if rationally related to a legitimate state purpose. *Id.* at 529-30; *Thornburgh*, 476 U.S. at 828.[6] Finally, it would include Justice

[6] Guam also contends that *Roe*'s requirement of a "compelling interest" on the part of the state was reduced to that of a "rational basis" in *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (*Akron II*), and *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990). *Akron II* and *Hodgson* dealt with minor women, however, and the Court has recognized that "the State has somewhat broader authority to regulate the activities of children than of adults." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

O'Connor's position elsewhere expressed that the state's compelling interest exists throughout pregnancy. *See Akron*, 462 U.S. at 459; *Thornburgh*, 476 U.S. at 828. From this mix, Guam derives the conclusion that its interest in fetal life can overcome the woman's right to choose whether to have an abortion, and that Guam's Act is therefore not unconstitutional on its face.

We reject Guam's construct. The bits and pieces assembled by Guam fall short of compelling us to do that which the Supreme Court itself has declined to do—overrule *Roe v. Wade*. In *Webster*, the Court modified *Roe* only to the extent necessary to uphold Missouri's requirement of testing for viability. *Webster*, 492 U.S. at 521. The plurality opinion stated that the case afforded no occasion to revisit *Roe*, "and we leave it undisturbed." *Id.* Justice O'Connor found no conflict between Missouri's statute and *Roe*, and similarly concluded that there was no need to reexamine *Roe*. *Id.* at 525-26. Three dissenters opined that *Roe* survived *Webster*, although it was not secure. *Id.* at 537 (dissenting opinion of Justice Blackmun, joined by Justices Brennan and Marshall). Justice Scalia in his concurrence chastised the Court for failing to overrule *Roe*. *Id.* at 532. In the face of these pronouncements, it would be both wrong and presumptuous of us now to declare that *Roe v. Wade* is dead.[7]

We also have severe difficulty accepting the conclusions that Guam draws from the existing mosaic of decisions. In the first place, it is hard to see how Justice O'Connor's view helps Guam: surely an outright criminalization of abortion places an "undue burden" on the exercise of the

[7] In its most recent abortion-related case, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), the Supreme Court upheld certain federal regulations against a challenge that they violated a woman's due process right to choose whether to terminate her pregnancy. The Court held that the regulations dealing with activities of federally-funded programs did not violate *Roe v. Wade*, *Id.* at 1777. It did not suggest that *Roe v. Wade* was no longer the law.

woman's right.[8] Second, a view of the state's interest in potential life as "compelling" throughout pregnancy does not necessarily mean that it sweeps all other interests out of the way.[9] There is a countervailing right in issue here, although we find little reflection of it in Guam's briefs. No matter how it is characterized, the right of a woman not to be forced to endure a pregnancy and birth is an extremely important one. Pregnancy entails "profound physical, emotional, and psychological consequences." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 (1981). "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy." *Thornburgh*, 476 U.S. at 772. The individual's interest in exercising control over intimate personal decisions has been recognized in decades of Court precedent. *See id.*; *Akron*, 462 U.S. at 419; *Roe*, 410 U.S. at 167-70 (Stewart, J., concurring); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). We would not lightly conclude that it could be overcome wholesale at any stage of pregnancy by Guam's interest in potential life.

The balancing of these vital individual interests against the state's interest in potential life is not an exercise in

[8] Because Justice O'Connor's "undue burden" test is of no assistance to Guam, we need not decide what authoritative effect, if any, it must be given. *See Planned Parenthood v. Casey*, 947 F.2d 682, 687-98 (3d Cir. 1991) (Justice O'Connor's standard is now the law of the land, *cert. granted*, 112 S. Ct. 931 (1992)).

[9] There clearly must be limits to the ability of a state's interest in potential life, whether or not characterized as compelling, to override all conflicting interests. Potential human life exists in the ovum and sperm. *See Webster*, 492 U.S. at 565-66 (Stevens, J., concurring in part and dissenting in part). A state could maximize that potential by forbidding contraception, or even by requiring regular sexual intercourse by all fertile persons. The prospect is absurd, of course, because there are highly important constitutional rights that would be interfered with by such a measure.

mathematics. These forces present a constitutional clash of the first order. Its outcome cannot be predetermined by adopting in the abstract various assembled characterizations of the interests at stake or formulae for weighing them. A more fundamental process is at work. *Roe* worked through that process and came to a result that has affected the lives and rights of millions of people. It is not for this court to discard that precedent.[10]

III

The judgment of the district court permanently enjoining the enforcement of Guam's Public Law 20-134 is

AFFIRMED.[11]

[10] We find it unnecessary to address the plaintiffs' arguments that Guam's Act is void for vagueness and overbreadth. We also decline to address the plaintiffs' arguments based on the Establishment Clause, the Equal Protection and Due Process Clauses, the Eighth and Thirteenth Amendments, and comparable provisions of the Guam Bill of Rights, 48 U.S.C. § 1421b.

[11] The plaintiffs have requested attorneys' fees in connection with this appeal. They will be entitled to them if they ultimately prevail in this proceeding. 42 U.S.C. § 1988; *see Hutto v. Finney*, 437 U.S. 678, 692 (1978). If the plaintiffs apply for fees in this court, we will transfer their application to the district court for a determination of the recoverable amount. In those proceedings, Guam will have the opportunity to contest the standing of the plaintiffs who are not health care providers, to the extent that that issue has any effect on recoverable fees.

Fees at the trial level were granted in a separate proceeding, separately appealable.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
TERRITORY OF GUAM

Civil Case No. 90-00013

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS; GUAM NURSES ASSOCIATION; THE REVEREND MILTON H. COLE, JR.; LAURIE KONWITH; EDMUND A. GRILEY, M.D.; JOHN DUNLOP, M.D., on behalf of themselves and all others similarly situated, and all their women patients,*
Plaintiffs,

v.

JOSEPH F. ADA, in his individual and official capacities; DR. LETICIA ESPALDON; GEORGE B. PALICAN; ELIZABETH BARRETT-ANDERSON; GLORIA B. NELSON, THOMAS J.B. CALVO, FLORENCIO T. RAMIREZ, LEONILA L.G. HERRERO and MICHAEL PHILLIPS, as the Board of Directors of the Guam Election Commission, in their official capacities, together with all others similarly situated,
Defendants

DECISION AND ORDER RE PERMANENT INJUNCTION AND OTHER MOTIONS

[Filed Aug. 23, 1990]

Attorney for Plaintiffs:
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P.O. Box X
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* Original lead plaintiff Maria Doe was dismissed as a party after motion and an order of the Court entered June 26, 1990.

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THIS MATTER came before the Court on August 7, 1990, for hearing of the following motions: Plaintiffs' motion for summary judgment and permanent injunction; plaintiffs' motion for summary judgment based on 42 U.S.C. § 1983; defendant Governor Ada's motion to dismiss; defendant Governor Ada's motion for partial summary judgment; and, defendant Attorney General Barrett-Anderson's motion to dismiss.

THE COURT, having reviewed the voluminous filings and having fully considered the arguments made by the parties in their respective memoranda of law and at oral argument, finds that there are no genuine issues of material fact which would preclude summary judgment and that such disposition is, therefore, appropriate.

Statement of Undisputed Facts

On July 10, 1989, Senator Elizabeth P. Arriola introduced Bill 848 before the Guam Legislature. Bill 848 provided as follows:

AN ACT TO REPEAL AND REENACT § 31.20 OF TITLE 9, GUAM CODE ANNOTATED, TO REPEAL §§ 31.21 AND 31.22 THEREOF, TO ADD 31.23 THERETO, TO REPEAL SUBSECTION 14 OF SECTION 3107 OF TITLE 10, GUAM CODE ANNOTATED, RELATIVE TO ABORTIONS, AND TO CONDUCT A REFERENDUM THEREON.

BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

Section 1. Legislative findings. The Legislature finds that for purposes of this Act [the] life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development.

Section 2. § 31.20 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"§ 31.20. Abortion: defined. "Abortion" means the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus. "Abortion" does not mean the medical intervention in (i) ectopic pregnancy, or (ii) in a pregnancy at any time after the commencement of pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother any such termination of pregnancy to be subsequently reviewed by a peer

review committee designated by the Guam Medical Licensure Board, and in either case such an operation is performed by a physician licensed to practice medicine in Guam or by a physician practicing medicine in the employ of the government of the United States, in an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam."

Section 3. § 31.21 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"§ 31.21. Providing or administering drug or employing means to cause an abortion. Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to cause an abortion of such woman as defined in § 31.20 of this Title is guilty of a third degree felony. In addition, if such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action."

Section 4. § 31.22 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"31.22. Soliciting and taking drug or submitting to an attempt to cause an abortion. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor."

Section 5. A new § 31.23 is added to Title 9, Guam Code Annotated, to read:

"§ 31.23. Soliciting to submit to operation, etc., to cause an abortion. Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor."

Section 6. Subsection 14 of Section 3107, Title 10, Guam Code Annotated, is repealed.

Section 7. Abortion referendum. (a) There shall be submitted to an island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the question to appear on the ballot in English and Chamorro: "Shall that public law derived from Bill 848, Twentieth Guam Legislature (P.L. 20-134), which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?"

In the event a majority of those voting vote "Yes," such public law shall be repealed in its entirety as of December 1, 1990.

(b) There is hereby authorized to be appropriated to the Election Commission (the "Commission") sufficient funds to carry out the referendum described in this Section 7, including but not limited to the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.

During later discussion of the Bill, the Senator justified the near-complete ban on abortions on Guam on the ground that

> Guam is a Christian community. That no matter which way you're going to say "this is not religion, this is not so and so," I beg to differ, Mr. Speaker. It's a Christian community. We decide what we're going to have here on Guam.[1]

Transcript of Legislative Session, March 8, 1990.

Senator Arriola's legal counsel had advised her that the Bill as introduced would probably be struck down because "[j]udges are bound by Supreme Court decisions

[1] This passage calls to mind the 1856 admonition of Chief Justice Black of the Commonwealth of Pennsylvania, as quoted by Justice Brennan in *School District of Abington Township (Pa.) v. Schempp*, 374 U.S. 203, 304, 83 S.Ct. 1560, 1614-1615 (1963):

> The manifest object of the men who framed the institutions of this country was to have a *State without religion*, and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other, and that no man's rights in one should be tested by his opinions about the other. As the Cnurch takes no note of men's political differences, so the State looks with equal eye on all the modes of religious faith. . . . Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate. "Essay of Religious Liberty," in Black, ed., *Essays and Speeches of Jeremiah S. Black* (1886), 53. (Emphasis in the original)

Schempp is a noteworthy primer on First Amendment religious freedom.

because [the decisions are] binding precedent, and that more than likely a judge would probably find that this bill was not in keeping with *Roe v. Wade*." Deposition of Attorney June Mair, May 10, 1990, at p.23.

On September 16, 1989, the Guam Legislature's Committes on Health, Welfare and Ecology and the Judiciary and Criminal Justice held a joint hearing on two abortion bills, Senator Arriola's and another introduced by two other senators. The latter bill would have allowed abortions under somewhat broader circumstances. Of the people who testified at the hearing, the "overwhelming majority . . . supported the bill on grounds of expressed religious belief or orientation." Committee Report on Bill 848, at pp. 3-4.

On February 26, 1990, Guam's Attorney General, Elizabeth Barrett-Anderson, filed twelve pages of written testimony with the Committee on Judiciary and Criminal Justice. The Attorney General gave as the legal opinion of her office that both bills were "violative of a woman's constitutional right of privacy as enunciated by the United States Supreme Court in *Roe v. Wade*." The Attorney General noted that a "state cannot interfere with a woman's right of personal privacy to decide to have an

abortion whatever the cause of her pregnancy. The state may *regulate* such a decision, but it cannot deprive a woman of such a choice." (Emphasis in original) Because both bills effectively proscribed abortion, the Attorney General gave as her legal opinion that "both bills would be held unconstitutional." Attorney General's Opinion, pp. 1-4.

After minor amendments, including the addition of a legislative "finding" that "life begins at conception," the Legislature unanimously passed the Bill 848 on March 8, 1990.

On March 19, 1990, defendant Governor Joseph F. Ada signed the bill into law as Public Law 20-134. In his March 23, 1990, transmittal letter to the Speaker, Governor Ada noted that his "pro-life" stance was well-known, but that Bill 848 was "even more severe than my views on the subject are." Despite his expressed misgivings about almost every substantive part of the bill, and after, in his own words, prayer and much soul-searching, the Governor

came to the realization that in terms of my personal beliefs and my personal actions, the question for me really boils down to one simple point. Do I consider a foetus a human being? In my heart, I believe a foetus is a human being. And having such belief, how could I accord a foetus any less respect or dignity than I would any other human being? Having come to this conclusion, my choice is fairly simple. Do I act in accordance with my firmly held personal beliefs, or do I not?

• • • •

Believing as I do, I personally can see no honorable course for me to take, no action that I could take and still be true to my conscience other than signing this bill. This is a personal decision, and one that I must make if I am to be true to my own beliefs.

The law took effect immediately and abortions were effectively banned in the Territory of Guam.

On March 20, 1990, Janet Benshoof, in a luncheon speech before the Guam Press Club, after acknowledging that Guam's new law prohibited the "soliciting" of abortions, "informed" the audience that abortions could be obtained in Hawaii and gave a telephone number in that state for further information. She was promptly arrested under the solicitation provisions of the new law. (These charges subsequently were dismissed, but without prejudice.)

On March 23, 1990, plaintiffs filed this lawsuit, challenging the constitutionality of the Act. Plaintiffs alleged that the law violates the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, the Organic Act of Guam, and 42 U.S.C. § 1983. The Court issued a temporary restraining order the same day. After a hearing on March 26, 1990, the temporary restraining order was continued in force until further order of the Court.

Decision

Summary Judgment and Permanent Injunction

After the emotionalism and stridency of the opposing views are stripped away, the strict legal issue before the Court is not one difficult of resolution: Is *Roe v. Wade*[2] the law in the Territory of Guam? Because the Court finds that it is, plaintiffs' motion for summary judgment is GRANTED and, for the reasons stated hereinbelow, defendants Governor Ada, Attorney General Barrett-Anderson, and Dr. Espaldon[3] are permanently

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[2] 410 U.S. 155, 93 S.Ct. 705, *reh. denied*, 410 U.S. 959, 93 S.Ct. 1409 (1973).

[3] Dr. Leticia Espaldon is the Director of the Department of Public Health and Social Services for the Territory of Guam.

Defendant George B. Palican is the Administrator of Guam Memorial Hospital. By stipulation filed June 25, 1990, he agreed

enjoined from enforcing any of the provisions of Public Law 20-134.

In 1968, the United States Congress amended the Organic Act of Guam.[4] Among the 1968 changes was one amending Guam's Bill of Rights to add an entire section:

> (u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; *the second sentence of section 1 of the fourteenth amendment*[5]; and the fifteenth and nineteenth amendments.
>
> All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency. (Emphasis added)

48 U.S.C. § 1421b(u).

Governor Ada insists that § 1421b(u) does not mean what it says. His position of record, in his memoranda

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"to abide by all injunctions and court orders and . . . be bound by the final judgment or decree in this action." The Election Commission entered into a like stipulation.

[4] Title 48 U.S.C. § 1421, *et seq.* The amendments were contained in the Guam Elective Governor Act, Pub.L. 90-497, § 10, 82 Stat. 842 (1968).

[5] The second sentence of section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and at oral argument, is that post-1968 United States Supreme Court decisions in the area of substantive due process rights and equal protection have no force and effect in the Territory of Guam. This unusual proposition is based upon his belief that since the United States Congress, when it amended the Organic Act in 1968, could not have foreseen the 1973 Supreme Court decision in *Roe v. Wade*, Congress could not have intended it to apply to the Territory of Guam. To quote from defendant Governor's memorandum of July 13, 1990:

> *Under Ngiraingas v. Sanchez*, [110 S.Ct. 1737 (1990)], in determining whether Congress extended the privacy/abortion right under the First, Third, Fourth, Fifth, Ninth or Fourteenth Amendments, this court must seek indicia of congressional intent at the time 48 U.S.C. Section 1421b(u) was enacted in 1968. There is, however, no clear signal given from the legislative history of Section 1421b (u) that Congress intended to extend the privacy/abortion right to Guam. As a matter of law, therefore, the First, Third, Fourth, Fifth and Ninth and Fourteenth Amendments, to the extent that they encompass a privacy/abortion right, do not have the same effect and application that they have in the states. *Roe v. Wade* . . . does not apply to Guam and Guam may regulate abortion as in Public Law 20-134.

According to Governor Ada, Guam was "frozen in time" in 1968 unless it can be shown that Congress gave a "clear signal" that post-1968 Supreme Court decisions involving any of the rights § 1421b(u) were to have force and effect in the Territory. He sees no such "signal."[6]

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[6] This appears to be the first time since 1968 that Guam's government has forwarded this interpretation of subsection (u). None of the defendants supplied the Court with any case citations in support of this singular reading of the Organic Act.

Governor Ada's precise argument finds no known precedent in American jurisprudential history. His reliance on *Ngiraingas* to support the "frozen in time" theory of the applicability of certain constitutional rights to the Territory of Guam is erroneous. It is sufficient here to note just one flaw in defendant's reasoning. Section 1983 was enacted by Congress more than a century ago in response to the activities of the Ku Klux Klan. It was not unreasonable in *Ngiraingas*, then, for the Supreme Court to look at § 1983's legislative history to determine if a territory such as Guam was intended to fall within its ambit. However, the Organic Act of Guam is a federal statute concerning *only* Guam. When it was amended in 1968, the amendments applied *only* to Guam. It is inconceivable to the Court that Congress would add subsection (u) to § 1421b and yet simultaneously fix it immutably in time in 1968 so that it would not truly "have the same force and effect" as in the United States, as provided.

This Court cannot imagine a clearer "signal" from Congress than that, by enacting subsection (u) in 1968, it felt an obligation to insure that the people of Guam would enjoy more of the constitutional protections afforded other citizens of the United States. Inarguably, it seems to this Court, the express words of the statute demonstrate that Congress intended that the people of the Territory of Guam would from 1968 onward be afforded the full extent of the constitutional protections added to Guam's Bill of Rights, as those rights are found in the United States Constitution and as they are construed and articulated by the United States Supreme Court. It follows, then, when interpreting subsection (u), that since the decisions of the United States Supreme Court, including *Roe v. Wade*, are the law of the land, they apply with equal force and effect to the Territory of Guam. Having determined that *Roe v. Wade* applies in Guam, the Court finds that Public Law 20-134 is unconstitutional. For the reasons given below, the entire law must fall.

This Court need not address the legislative funding of Section 1 that "life begins at conception." It is sufficient to note that Guam cannot "justify" an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodies Guam's view of when life begins.

Next, as the *Roe* Court noted, the United States Supreme Court has recognized since at least 1891 that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. The roots of this right of privacy are found in the First Amendment, the Fourth and Fifth Amendments, the penumbrae of the Bill of Rights, the Ninth Amendment, and the concept of liberty guaranteed by the first section of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. at 152-153. The right of privacy has some extension to marriage, procreation, contraception, family relationships, child rearing and education, and the qualified right to obtain an abortion. *Id.*

However, as *Roe* noted, the right of personal privacy, in the context of a woman's decision regarding abortion, is not unqualified and must be weighed against important state interests in regulation. *Id.*, at 155. Under *Roe*, Guam may regulate abortions only to serve two compelling interests: The government's paramount interest throughout the pregnancy in the woman's health, *Id.* at 154, and the government's interest after viability in protecting the potentiality of human life, *Id.*, at 162. During approximately the first trimester of pregnancy, neither of these interests is deemed "compelling" for purposes of constitutional analysis and the government may not restrict a woman's right to choose an abortion. *Id.*, at 164. During approximately the second trimester, the government may only regulate the abortion procedure in ways that are "reasonably related to maternal health." *Id.* After viability [of the fetus], the government may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate

medical judgment, for the preservation of the life or health of the mother. *Id.*, at 165. Therefore, any law purporting to regulate abortion must take into account these different interests, and protect both the rights of the individual woman and the interests of the state.

Because Sections 2 [7], 3 [8], 4 [9], and 5 (Title 9 G.C.A. §§ 31.20, 31.21, 31.22, and 31.23, respectively) of the

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[7] The "two-physician" and "peer review" provisions fail. *See, Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, *reh. denied*, 410 U.S. 959, 93 S.Ct. 1410 (1973).

The "two-physician" requirement fails because the "required acquiescence by co-practitioners has no rational connection with a *patient's* needs and unduly infringes on a physician's right to practice." (Emphasis added) *Id.*, at 199. Also, the section contains no emergency exception to the two-physician requirement, as required by the Supreme Court in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 770-771 (1986).

The "peer review committee" fails because it is "unduly restrictive of the patient's rights that . . . have already been medically delineated and substantiated by her personal physician." *Id.*, at 197-198. As well, the additional time necessitated by this procedure may implicate the Supreme Court's decision in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), which invalidated a 24-hour waiting requirement.

Finally, some of the phrases contained in this section—such as "practice independently of each other," "reasonably determine using all available means," "substantial risk," "gravely impair," and "adequately equipped medical clinic"—lacking as they do any precise definition, would undoubtedly raise due process questions since "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

[8] Section 3 directly contravenes the law as established by *Roe v. Wade*.

[9] Sections 4 and 5 also violate the First Amendment since they attempt to prohibit freedom of speech. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because

Guam law fail to make distinctions based on the stage of the pregnancy, and because the law does not recognize, as it must, any of the other constitutionally-protected interests involved, it violates the Due Process Clause of the Fourteenth Amendment,[10] as it applies to Guam via § 1421b(u).[11]

42 U.S.C. § 1983 Claims

Because of the importance of the issue and the seemingly unsettled state of the law as it applies to Guam, the Court believes it is necessary and proper to address plaintiffs' § 1983 claims.

The Supreme Court has held that "neither the Territory of Guam nor its officers acting in their official capacities are 'persons' under § 1983." *Ngiraingas v. Sanchez*, —— U.S. ——, 110 S.Ct. 1737, 1743 (1990). The Supreme Court has also said, however, that "a state

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society finds the idea itself offensive or disagreeable. [Citations omitted]." *Texas v. Johnson*, —— U.S. ——, 109 S.Ct. 2533, 2544 (1989).

These two sections are constitutionally infirm insofar as they would make criminal any discussion between a woman and her doctor concerning the need for, and access to, an abortion. The state has no compelling interest in intruding in this most private area of consultation between a woman and her physician. *See, e.g., Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990).

These sections are also invalid on their face insofar as they purport to prohibit more general speech concerning abortion and its availability. *See Thornburgh, supra*, 476 U.S. at 760-764; *Akron Center for Reproductive Health, supra*, 462 U.S. at 429-430, 443-445.

[10] To paraphrase *Roe*, "Indeed, it is difficult to imagine a more complete abridgement of a constitutional freedom than that worked by the inflexible criminal statute now in force in [Guam]." *Roe v. Wade*, 410 U.S. at 171.

[11] In light of the Court's decision, Section 7 of the Act, providing for a referendum, is rendered moot. The Election Commission was named as a defendant since it would have been charged with responsibility for conducting the referendum. The Commission has remained neutral throughout these proceedings.

official acting in his or her official capacity, when sued for injunctive relief, *would* be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the state'." (Emphasis added) *Will v. Michigan Dept. of State Police*, —— U.S. ——, 109 S.Ct. 2304, 2311, N. 10 (1989), *quoting*, *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14, 105 S.Ct. 3099, 3106, n. 14 (1985). The theory supporting this view was expressed in *Ex Parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 453-454 (1908):

> The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.
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> * * * *
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> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Plaintiffs thus make two arguments for the continuing vitality and utility of § 1983 in the Territory of Guam. First, they argue that *Ngiraingas* left open the question of the availability under § 1983 of injunctive relief

against the Territory of Guam and its officers acting in their official capacities. Second, they maintain that § 1983 injunctive relief is available against Governor Ada in his *individual* capacity. The Court will consider each claim in turn.[12]

The Supreme Court's decision in *Ngiraingas* did not address, and thus cannot be said to have changed, the rule that prospective injunctive relief is available against an official acting in his or her official capacity. *See, Will* and *Kentucky v. Graham, supra.* However, because both the Supreme Court and the Ninth Circuit, in their respective *Ngiraingas* decisions, found on the facts of that case that Guam was not a "person" for purposes of § 1983, neither court confronted the issue of whether Guam, like a state, enjoys sovereign immunity under the Eleventh Amendment or the extent of the immunity afforded by 42 U.S.C. § 1421a[13]. *Ngiraingas v. Sanchez*, 110 S.Ct. at 1739, n. 2, and 1743, n. 12.

The Court believes that Guam does not on the facts before it enjoy immunity from injunctive relief, whether based on the Eleventh Amendment or § 1421a. "In an injunction grounded on federal law, the State's [Eleventh Amendment] immunity *can* be overcome by naming state officials as defendants." (Emphasis in original) *Kentucky v. Graham*, 473 U.S. at 170, n. 18, *citing Pennhurst State*

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[12] The Court is aware, as surely are the parties, that a finding of any relief predicated upon § 1983 will entitle plaintiffs to apply for an award of attorney fees under 42 U.S.C. § 1988. Section 1988 provides in part that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[13] Section 1421a provides in part that "The government of Guam . . . shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers."

School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900 (1984), and *Ex parte Young, supra*. Similarly, and relying again on the reasoning of *Ex parte Young* and its progeny the Court finds that § 1983 provides an independent ground to permanently enjoin defendants Governor Ada, Attorney General Barrett-Anderson, and Dr. Espaldon from enforcing any of the provisions of Public Law 20-134.[14]

The remaining issue involves § 1983 injunctive relief against Governor Ada in his individual capacity. Plaintiffs argue that such relief is available because the Supreme Court noted without objection that portion of the

[14] The Court does not today, of course, address the issue of attorney fees. The § 1988 provision for an award of attorney fees and costs was enacted to encourage enforcement of civil rights provisions by compensating those who bring meritorious actions. The possibility of an award of fees and costs provides an important inducement for attorneys to undertake the vindication of constitutional rights in unpopular causes. Without such a provision, the sheer economic hardship placed upon practitioners who undertake such representation would effectively prohibit them from entering the fray.

Left for future consideration is the effect of the Ninth Circuit's reasoning in its *Ngiraingas* decision that a § 1983-based money judgment against defendants in their official capacities was prohibited because it would have affected the public treasury and, thus, would essentially have been a suit against the Government of Guam itself. *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1372 (9th Cir. 1988). Likewise here, even though the granting of injunctive relief does not itself affect the public treasury, a request for, and an award of, attorney fees following the injunction *would* most assuredly affect the public treasury. The Court is cognizant of those cases that treat attorney fees as "ancillary" to the merits of the case and which are deemed, therefore, not to affect the public treasury. *See, e.g., Kentucky v. Graham*, 473 U.S. at 170, n. 18; *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978); *Edelman v. Jordan*, 415 U.S. 651, 667-668 (1974); *Maher v. Gagne*, 448 U.S. 122, 131-132, 100 S.Ct. 2570, 2575-2576 (1980) and *Gagne v. Maher*, 594 F.2d 336, 341-342 (2nd Cir. 1979); *Ward v. County of San Diego*, 791 F.2d 1329, 1334 (9th Cir. 1986); and, *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir. 1983).

Ninth Circuit's *Ngiraingas* opinion which held that the police officers there still could be sued under § 1983 in their individual capacities, to the extent they were not entitled to immunity. *Ngiraingas v. Sanchez*, 110 S.Ct. at 1739, n. 3.

The distinction between personal-capacity liability and official-capacity liability was explained in *Kentucky v. Graham*, 473 U.S. at 166-168, 105 S.Ct. at 3105-3106 (1985):

> Personal-capacity suits seeks to impose personal liability upon a government official for actions he takes under color of state law. (Citations omitted)
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> • • • •
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> On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. (Citation omitted)
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> • • • •
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> When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objective reasonable reliance on existing law. In an official-capacity action, these defenses are unavailable. (Citations omitted) The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.
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> With this distinction in mind, it is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. (Emphasis in the original)

Graham involved a suit for money damages. Here, in contrast, plaintiffs seek to enjoin Governor Ada, as an *individual*, from enforcing the provisions of Public Law 20-134. The Court does not believe it would be possible for the Governor, acting as a *private individual*, to enforce Public Law 20-134. The Court declines to enjoin Governor Ada, as an individual, under § 1983.

Accordingly, for the reasons given above, summary judgment shall enter that Public Law 20-134 violates the United States Constitution, the Organic Act of Guam, and 42 U.S.C. § 1983. Defendants, their employees, agents, and successors, are permanently enjoined from enforcing and/or executing any portion of Public Law 20-134.

IT IS SO ORDERED.

DATED this 23rd day of August, 1990.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

Civil Action No. 90-00013

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,
Plaintiffs,

v.

JOSEPH F. ADA, in his individual and official capacities, *et al.*,
Defendants.

AMENDED JUDGMENT

[Filed Oct. 16, 1990]

Pursuant to the Order granting plaintiffs' Motion to Alter or Amend Judgment issued today, the judgment previously entered in this matter is hereby amended as follows:

This matter came on for hearing, on August 7, 1990 on plaintiffs' Motion for Summary Judgment re 42 U.S.C. § 1983 and Motion for Summary Judgment and Permanent Injunction pursuant to Rule 56 of the Federal Rules of Civil Procedure; defendant Ada's Motion for Partial Summary Judgment; and defendants Ada's and Barrett-Anderson's Motions to Dismiss. The Court having considered the pleadings in the action, the motions, oppositions and replies, all of the declarations and exhibits on file herein, and having heard oral argument and having found that there is no genuine issue of fact to be sub-

mitted to the trial court, and having concluded that plainitffs are entitled to judgment as a matter of law, the Court having further concluded that a permanent injunction should issue because plaintiffs will suffer permanent and irreparable injury, loss and damage,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANTS in their official capacities in accordance with the Decision and Order filed in this matter on August 23, 1990. Defendant Joseph F. Ada cannot be held liable in his individual capacity under 42 U.S.C. § 1983.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that sections two through five of Public Law 20-134 are hereby declared unconstitutional and void under the U.S. Constitution, the Organic Act and 42 U.S.C. § 1983. Consequently, section seven of Public Law 20-134 is hereby rendered moot.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Joseph F. Ada, Leticia Espaldon, George B. Palican, Elizabeth Barrett-Anderson, Gloria B. Nelson, Thomas J.M. Calvo, Florencio T. Ramirez, Leonila L.G. Herrero and Michael F. Phillips, in their official capacities, their officers, agents, assistants, servants, employees, successors and all persons acting in concert or cooperation with them at their direction or under their control be restrained and enjoined permanently from operating, administering, enforcing or executing all provisions of Public Law 20-134.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the Order Granting Ex Parte Motion for Extension of Time to File Application for Attorneys' Fees and Costs, dated September 17, 1990, plaintiffs may file their application for attorneys fees,

costs, and disbursements within thirty (30) days from entry of this Amended Judgment. Defendants shall have thirty (30) days to file a response to plaintiffs' application, and plaintiffs shall have fifteen (15) days to reply to defendants' response.

Dated this 16th day of October, 1990.

/s/ Alex R. Munson
JUDGE ALEX R. MUNSON

APPENDIX D

Public Law 20-134

TWENTIETH GUAM LEGISLATURE
1989 (FIRST) Regular Session

Bill No. 848 (COR)
Substituted by the author

Introduced by: E. P. Arriola
T. S. Nelson

AN ACT TO REPEAL AND REENACT § 31.20 OF TITLE 9, GUAM CODE ANNOTATED, TO REPEAL §§ 31.21 AND 31.22 THEREOF, TO ADD § 31.23 THERETO, TO REPEAL SUBSECTION 14 OF SECTION 3107 OF TITLE 10, GUAM CODE ANNOTATED, RELATIVE TO ABORTIONS, AND TO CONDUCT A REFERENDUM THEREON.

BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

Section 1. Legislative findings. The Legislature finds that for purposes of this Act [the] life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development.

Section 2. § 31.20 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"§ 31.20. Abortion: defined. "Abortion" means the purposeful termination of a human pregnancy

after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus. "Abortion" does not mean the medical intervention in (i) an ectopic pregnancy, or (ii) in a pregnancy at any time after the commencement of pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother, any such termination of pregnancy to be subsequently reviewed by a peer review committee designated by the Guam Medical Licensure Board, and in either case such an operation is performed by a physician licensed to practice medicine in Guam or by a physician practicing medicine in the employ of the government of the United States, in an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam."

Section 3. § 31.21 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"31.21. Providing or administering drug or employing means to cause an abortion. Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to cause an abortion of such woman as defined in § 31.20 of this Title is guilty of a third degree felony. In addition, if such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action."

Section 4. § 31.22 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"31.22. Soliciting and taking drug or submitting to an attempt to cause an abortion. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor."

Section 5. A new § 31.23 is added to Title 9, Guam Code Annotated, to read:

"§ 31.23. Soliciting to submit to operation, etc., to cause an abortion. Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor."

Section 6. Subsection 14 of Section 3107, Title 10, Guam Code Annotated, is repealed.

Section 7. Abortion referendum. (a) There shall be submitted at the island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the question to appear on the ballot in English and Chamorro:

"Shall that public law derived from Bill 848, Twentieth Guam Legislature (P.L. 20-——), which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?

In the event a majority of those voting vote "Yes", such public law shall be repealed in its entirety as of December 1, 1990.

(b) There is hereby authorized to be appropriated to the Election Commission (the "Commission") sufficient funds to carry out the referendum described in this Section 7, including but not limited to the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT—
FOR THE TERRITORY OF GUAM

Civil Action No. 90-00013

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS; GUAM NURSES ASSOCIATION; THE REVEREND MILTON H. COLE, JR.; LAURIE KONWITH; EDMUND A. GRILEY, M.D.; WILLIAM S. FREEMAN, M.D.; JOHN DUNLOP, M.D.; on behalf of themselves and all other similarly situated, and all their women patients,

Plaintiffs,

vs.

JOSEPH F. ADA, in his individual and official capacities, LETICIA ESPALDON, GEORGE B. PALICAN, ELIZABETH BARRETT-ANDERSON, GLORIA B. NELSON, THOMAS J.M. CALVO, FLORENCIO T. RAMIREZ, LEONILA L.G. HERRERO and MICHAEL F. PHILLIPS, THE BOARD OF DIRECTORS OF THE GUAM ELECTION COMMISSION, in their official capacities, together with all others similarly situated,

Defendants.

NOTICE OF APPEAL

[Filed Nov. 13, 1990]

NOTICE IS HEREBY GIVEN that Defendant Joseph F. Ada hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Denying Motion for Protective Order filed April 4, 1990, the Decision and Order filed on August 23, 1990 and Amended

Judgment filed on October 16, 1990 and which were entered on the docket on April 4, 1990, August 23, 1990 and October 17, 1990, respectively, in the above-entitled case.

DATED this 13th day of November, 1990.

/s/ Katherine A. Maraman
KATHERINE A. MARAMAN
Attorney for Defendant Ada

No. 92-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH F. ADA, GOVERNOR OF GUAM, in his official capacity,

Petitioner,

—v.—

GUAM SOCIETY OF OBSTETRICIANS & GYNECOLOGISTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the unconstitutionality of Guam Public Law 20-134 ["the Act"], which prohibits all abortions except in cases of ectopic pregnancy or in any pregnancy after implantation if two physicians, who practice independently of each other, "reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair [her] health," is a matter of settled law under *Roe v. Wade*, *Doe v. Bolton* and *Planned Parenthood v. Casey*.

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Respondents Guam Society of Obstetricians & Gynecologists, *et al.*, submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Joseph F. Ada. The petition seeks review of the unanimous decision of the United States Court of Appeals for the Ninth Circuit, issued April 16, 1992, affirming the amended judgment of the United States District Court for the District of Guam entered on October 16, 1990. The opinion of the Court of Appeals is reported at 962 F.2d 1366 (9th Cir. 1992).

COUNTERSTATEMENT OF THE CASE

On July 10, 1989, Senator Elizabeth P. Arriola introduced Bill 848 before the Guam Legislature to challenge *Roe v. Wade*, 410 U.S. 113 (1973), justifying the near complete ban on abortions on the ground that "Guam is a Christian community." *See* 20a.[1] Bill 848 was later amended to include limited exceptions for ectopic pregnancies and pregnancies that endanger a woman's life or pose a substantial risk of grave impairment to her health. The Bill then became known as Substitute Bill 848, which was passed unanimously by the unicameral Legislature on March 8, 1990 after threats of excommunication from the Roman Catholic Archbishop of Guam. On March 19, 1990, petitioner signed the Bill into law as Public Law 20-134, effective immediately, based on his "personal belief" that "a foetus is a human being." *See* 22a.

The Act prohibits all abortions except in two narrow circumstances: (1) in cases of ectopic pregnancy; and (2) in any other pregnancy after implantation if *two* physicians who "practice independently of each other reasonably determine using all available means that there is a

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[1]Citations to the Appendix to the Petition for Certiorari are in the form "__a"; those to the Appendix to this Brief are in the form "A-_."

substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair [her] health." 39a. The Guam ban not only prohibits performing abortions, but also prohibits "procuring" women to obtain abortions, 39a (§ 3); "soliciting" women to obtain abortions, 40a (§ 5); and prohibits the woman herself from soliciting or "submitting to" an abortion. 40a (§ 4). Thus, abortion providers, counselors and women obtaining abortions are criminally liable under the Act.

During the four days before the Act was enjoined, respondent doctors stopped performing abortions and counseling or referring for abortions. A-3-4; A-5-6; A-7. Some women made plans to travel to Manila, Philippines and Hawaii to obtain abortions. A-5-6. Respondent physicians also stopped inserting IUDs or prescribing morning after pills. A-4. Maria Doe, originally a named plaintiff, was scheduled to have an abortion the day after the law went into effect because she believed that medication she had taken during her pregnancy would have harmful effects on her fetus. Doe Decl. ¶¶ 2, 5.[2] Three doctors refused to perform Doe's abortion, informing her that abortion was now illegal on Guam, and that they were prohibited by the Act from telling her where she could obtain a legal abortion. Doe Decl. ¶ 3.[3]

On March 20, 1990, Janet Benshoof, in a public speech at the Guam Press Club, informed the audience that

[2]The two Declarations (Doe Decl., 3/21/90 and Doe Decl. 2d, 6/14/90) of Maria Doe were sealed by the district court. Ten copies of each have been lodged with the Court.

[3]Maria Doe dropped out of the lawsuit because she was fearful of having her identity revealed in a community as small as Guam. Doe Decl. 2d ¶ 2; *see also* 16a n.*.

abortions could be obtained in Hawaii and gave a telephone number there for further information. 23a. She was promptly charged under the Act's criminal solicitation provisions.[4] *Id.* On March 21, 1990, the Attorney General notified the Guam Police Department, Guam Memorial Hospital, and the Department of Public Health and Social Services that "the new law presents difficult and sensitive law enforcement problems," recognizing the potential for arbitrary enforcement of the Act. A-8.

On March 23, 1990, four days after the Act became law, respondents[5] filed a class action suit and motion for temporary restraining order in the United States District Court for the District of Guam.[6] Respondents challenged the Act as unconstitutional both on its face and as it was applied during the four days it was enforced. On the same day, the court granted the restraining order, and defendants later stipulated to extension of the order pending a trial or

[4]These charges were subsequently dismissed, but without prejudice. *Id.*

[5]Respondents are Guam Society of Obstetricians and Gynecologists, licensed physicians who perform abortions during the first and second trimester of pregnancy who represent themselves, their patients and the class of approximately 30,000 child-bearing women on Guam; the Guam Nurses Association, a non-profit organization of registered nurses who provide abortion counseling and services to pregnant women on Guam; the Reverend Milton H. Cole, Jr., an Episcopal priest who believes and preaches that a woman must be counselled on all options available to her regarding pregnancy, including abortion; Laurie Konwith, who is Jewish and whose faith requires that a woman's health take precedence over any fetal interests and that it is the religious duty of a woman to have an abortion under certain circumstances; and physicians Griley, Freeman and Dunlop, all members of the Guam Society.

[6]The district court certified the class on April 4, 1990.

final judgment. The Attorney General of Guam, a defendant, conceded that the Guam ban was unconstitutional, and the other Guam government defendants filed non-oppositions to plaintiffs' motion for summary judgment. However, the Governor argued that *Roe* does not apply to Guam because of its territorial status and that the Guam ban is justified by the territory's "custom" of "Catholicism." A-10. After full briefing on cross-motions for summary judgment, the district court on August 23, 1990 declared the law unconstitutional and issued a permanent injunction against enforcement of the Act. 34a.

In its "Decision and Order" of that date, the District Court held that *Roe v. Wade* applies to Guam, 24a-26a; that the Act violates *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), 26a-29a, 28a n.7; that the solicitation provisions of the law (§§ 4, 5) violate the free speech clause of the First Amendment, 28a n.9; and that the Governor is subject to injunctive relief under 42 U.S.C. § 1983 in his official capacity. 29a-32a. The District Court also suggested that the law might violate the Establishment Clause, 20a n.1, and that certain language in the law was impermissibly vague. 28a n.7.

An appeal was taken by the Governor, the only defendant who persisted in defending the Act,[7] to the

[7]The other defendants in the case declined to appeal the lower courts' decisions on the Act's unconstitutionality. They were the Attorney General of Guam; the Director of the Guam Department of Public Health and Social Services; the Administrator of the Guam Memorial Hospital, the only public hospital on Guam that provides abortion services; and the Board of Directors of the Guam Election Commission, which holds public elections, including referenda, on Guam.

United States Court of Appeals, which unanimously affirmed the district court's decision on April 16, 1992.

REASONS FOR DENYING THE WRIT

Petitioner's request for a writ of certiorari should be denied because he has failed to establish any of the factors that weigh in favor of granting the petition. Petitioner alleges no conflict between the United States Court of Appeals for the Ninth Circuit and any other court of appeals, nor a conflict between the Ninth Circuit and this Court. Petitioner's implied claim that this case involves an "important question of federal law which has not been, but should be, settled by this Court," Sup. Ct. R. 10, is simply a request that this Court re-examine *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). Just two weeks before this petition was filed, this Court settled precisely the question at issue here. Holding that "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," *Casey*, 112 S. Ct. at 2821 (Joint Opinion), this Court reaffirmed that a ban on all abortions, both before and after viability, such as Guam's, is unconstitutional. This Court should reject petitioner's meritless attack on *Casey*.[8]

[8]Supreme Court Rule 42.2 (formerly Rule 49.2) provides in relevant part: "When a petition for a writ of certiorari . . . is frivolous, the Court may award the respondent . . . just damages and single or double costs." Members of this Court have advocated sanctions for frivolous appeals or petitions for writ of certiorari. *See generally Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1071 (1985) (denying certiorari) (Stevens, J., concurring) ("if it appears that unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success, an award of double costs and damages occasioned by the delay may be appropriate."); *id.* at 1073 (opinion of Burger,

(continued...)

Moreover, the Petition is no more than a request for an advisory opinion, which is prohibited by Article III case and controversy requirements. Guam enacted an absolute ban, yet petitioner seeks review of the Act as if it had been written to prohibit abortions only in certain narrow circumstances. Only if and when Guam enacts such a narrow statute should this Court consider granting review. In support of his argument, petitioner relies only on facts not in the record in an attempt to have this Court issue a binding legislative reconstruction of Guam's statute. For all these reasons, the Court should deny the writ.

I. THE GUAM BAN IS UNCONSTITUTIONAL UNDER *ROE V. WADE*, *DOE V. BOLTON* AND *PLANNED PARENTHOOD V. CASEY*.

The Guam Act would prohibit ninety-nine percent of the abortions performed on Guam. This Court has repeatedly rejected the constitutionality of an outright abortion ban such as that contained in the Guam Act. In *Roe v. Wade*, this Court held:

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[8](...continued)
C.J.) ("Judicious use of the sanction of Rule 49.2 in egregious cases . . . should discourage many of the patently meritless applications that are filed here each year."); *Crumpacker v. Indiana Supreme Court Disciplinary Comm'n*, 470 U.S. 1074 (1985) (opinion of Burger, C.J.) ("effort to invoke the Court's jurisdiction on an utterly frivolous claim should subject the attorney who filed the jurisdictional statement to the sanction of Rule 49.2 of this Court."); *see also Southern Railway Co. v. Gadd*, 233 U.S. 572, 581 (1914) (assessing penalty where "the case was carefully and fully considered in both of the courts below" and "the writ of error was prosecuted only for delay"). Where, as here, the delay reflects only a vulgar hope for a change in this Court's composition and the petition demands a breach of this Court's "promise of constancy," *Casey*, 112 S. Ct. at 2815, the case for sanctions appears to be stronger.

> A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

410 U.S. at 164. This "essential holding of *Roe v. Wade*" was "retained and once again reaffirmed," *Casey*, 112 S. Ct. at 2804, less than two months ago by this Court in *Casey*:

> It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. *Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.*

Id. (emphasis added).

This Court reaffirmed *Roe* after an exceedingly careful review of the source for the "[c]onstitutional protection of the woman's decision to terminate her pregnancy," *Casey*, 112 S. Ct. at 2804, *id.* at 2804-08, and of the doctrine of *stare decisis*. *Id.* at 2808-16. The Court concluded that "[a] decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment

to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision . . . ." *Id.* at 2816.

Even under the newly articulated undue burden standard, the *Casey* Joint Opinion provides, "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 2821. That the Act is unconstitutional under *Roe*, as reaffirmed in *Casey*, is beyond doubt.[9] As the Ninth Circuit held, "The Guam Act gives not a nod toward *Roe*. With two narrow exceptions, it simply negates the rights and interests of the pregnant woman and forbids her to terminate her pregnancy from the moment of conception. It is difficult to imagine a more direct violation of *Roe*." 11a. Because the Act is unconstitutional as a matter of settled law, and because no clarification of the law is needed or required, the petition should be denied. *See* Sup. Ct. R. 10.[10]

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[9]The Act is also unconstitutional under *Doe v. Bolton*, 410 U.S. 179 (1973), in which the Court held: "Required acquiescence by co-practitioners has no *rational* connection with a patient's needs and unduly infringes on the physician's right to practice." *Id.* at 199. Like the Georgia statute in *Doe*, the Guam law requires the concurrence of a second physician for those pregnancies that might meet the stringent requirement of endangering the woman's life or creating a substantial risk of grave impairment of her health. Under *Doe*, this requirement is not only unconstitutional, but irrational. The Court in *Casey* pointed out that *Doe* is consistent with the undue burden standard. 112 S. Ct. at 2819.

[10]In the first decision to apply *Casey* to a criminal ban on virtually all abortions, the Oklahoma Supreme Court invalidated an initiative petition that would have submitted to the voters of Oklahoma a provision "*criminaliz*[ing] and *absolutely prohibit*[ing] abortions" except in four narrow circumstances: grave impairment of the woman's physical or

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II. PETITIONER'S REQUEST FOR AN ADVISORY OPINION ON HYPOTHETICAL STATUTES VIOLATES ARTICLE III AND MUST BE REJECTED.

Petitioner urges this Court to use this case as a vehicle to advise legislatures about the extent of permissible restrictions on abortion. Specifically, he suggests that the Court rule on the constitutionality of legislation banning abortions for sex-selection and the sale of fetal tissue, and on the restrictions permissible for post-viability abortions, because, he claims, if these hypothetical applications pass muster, a facial challenge to the Act must fail.[11]

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[10](...continued)
mental health; rape; incest; and grave physical or mental defect of the fetus. *In re Initiative Petition No. 349*, No. 76,347, 1992 WL 184028 at *5 (Okla. Aug. 4, 1992) (emphasis in original). The court held that such a ban -- which on its face is less restrictive than the Guam Act -- "does not allow a woman to make a private decision to obtain an abortion at any time during the pregnancy -- either before or after viability. It does not protect a woman's liberty interest as defined by *Casey*." *Id.* Accordingly, the court struck the Initiative from the ballot.

Similarly, attorneys for the state of Utah in *Jane L. v. Bangerter*, No. 91-C-345-G, recently conceded that Utah's criminal statute banning virtually all abortions is unconstitutional under *Casey* ("Utah Code Ann. § 76-7-302(2), to the extent that it prohibits the performance of nontherapeutic abortions prior to twenty weeks gestational age, appears to be unconstitutional."). Letter from Mary Anne Q. Wood to United States District Judge J. Thomas Greene (June 30, 1992), *see* A-2.

[11]Petitioner characterizes this case as a facial challenge and argues that since some of the Act's applications may be valid, the Act should be upheld as facially constitutional. *Casey*, however, not only settled the unconstitutionality of Guam's abortion ban, it also rejected an argument like petitioner's, *viz.*, that a statute may be facially constitutional even if

(continued...)

Petitioner's request that this Court determine all possible circumstances under which abortion may be constitutionally prohibited, absent a statute banning abortion in those particular circumstances, is a request for an advisory opinion, in violation of Article III of the United States Constitution.

None of Petitioner's hypothetical statutes are the law on Guam or at issue in this case. The Act does not mention sex-selection, fetal tissue sales, or even viability. Nor does the legislative history of the Act discuss or consider any of these particular prohibitions. Petitioner invents various statutes and asks the Court to rule on their constitutionality. *See Shaffer v. Heitner*, 433 U.S. 186, 220-221 (1977) (Brennan, J., dissenting) ("a purer example of an advisory opinion is not to be found" than Court's commentary on constitutionality of hypothetical Delaware minimum-contacts law). Both the lack of a statute presenting the issues raised by the petition and the lack of a plaintiff with a real stake in the "controversy" deprives this Court of Article III

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[11](...continued)
the constitutional rights of a small number of affected individuals are infringed: "Legislation is measured for consistency with the Constitution by the impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." 112 S. Ct. at 2829. Under this analysis, the spousal notice requirement was struck down as unconstitutional *on its face*, even though it *might* have a range of constitutional applications. The critical inquiry is whether "in *a large fraction* of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 2830. Respondents easily satisfy this standard. Moreover, *Casey* was a facial challenge -- the Pennsylvania statute never went into effect -- while respondents' challenge to Guam's statute is both facial and as applied.

jurisdiction to resolve the hypothetical issues raised by petitioner.

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)). Both constitutional and practical reasons support this Court's refusal to rule on hypothetical or abstract issues. "Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* at 97. By rendering an opinion on petitioner's hypothetical statutes, the Court would exceed the power assigned to it by the case or controversy requirement of Article III. *Id.* at 96. Moreover, "[s]hould the courts seek to expand their power so as to bring under their jurisdiction ill defined controversies over constitutional issues, they would become the organ of political theories." *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90-91 (1947).

The Governor's request for all possible constitutional applications of the Guam statute does not present this Court with a case or controversy. He asks this Court to review statutes that have not yet been enacted. The Court has rejected similar requests for an advisory opinion in *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977) (per curiam), where the Court refused to review the constitutionality of regulations before becoming effective even though if enacted the Court acknowledged they would need modifications: "Such an action on our part would amount to the rendering of an advisory opinion . . . For [this Court] to review regulations not yet promulgated, the final form of which has only been hinted at, would be wholly novel." *Id.* at 104. This Court also refused to

review the constitutionality of regulations that had not yet taken effect in *Nixon v. Administrator of General Services*, 433 U.S. 425, 438-39 (1977).

The Governor's request is too abstract, and the effects of his proposed law too speculative, for this court to grant review. A ruling by the Court on the hypothetical statutory provisions created by the Governor would be non-binding and thus tantamount to an advisory opinion. This Court has stated that it "will not write nonbinding limits into a silent state statute." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988).

The questions presented by the Governor are also non-justiciable for prudential reasons. Judgments cannot be rendered on such abstract issues without a proper record. "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an injury for the proper exercise of the judicial function." *Renne v. Geary*, 111 S. Ct. 2331, 2340 (1991) (quoting *Longshoremen's Union v. Boyd*, 347 U.S. 222, 224 (1954)). For example, the Governor suggests that the Court examine a hypothetical prohibition on unnecessary pre-viability abortions and all post-viability abortions. But there is no factual record to aid this Court's determination of the validity of such prohibitions or of what constitutes an "unnecessary" pre-viability abortion. The Governor also suggests that abortions for sex-selection and fetal tissue sales can be constitutionally banned, but there is no evidence that such abortions have even been performed on Guam and no evidence of any Guamanian women seeking to have such abortions. The important interests implicated by the hypothetical questions posed cannot be balanced

absent a concrete, factual record.[12] As the Court recently held:

> The free speech issues argued in the briefs filed here have fundamental and far-reaching import. For that very reason, we cannot decide the case based upon the amorphous and ill-defined factual record presented to us. Rules of justiciability serve to make the judicial process a principled one. Were we to depart from those rules, our disposition of the case would lack the clarity and force which ought to inform the exercise of judicial authority.

Renne, 111 S. Ct. at 2340.[13]

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[12]The Governor himself recognizes the potential for "erroneous result[s] due to the lack of an adequate factual record and the lack of well-developed legal arguments." *Pet.* at 16.

[13]*See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them") (citations omitted); *Renne*, 111 S. Ct. at 2339 (1991) ("We possess no factual record of an actual or imminent application of § 6(b) sufficient to present the constitutional issues in 'clean-cut and concrete form'") (quoting *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584 (1947)); *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 312 (1971) ("We find no reference to this aspect of the case in the opinions in the District Court and the Court of Appeals. We are unsure whether it was presented below and whether, in any event, there is record support for it. Accordingly, we deem it inappropriate to consider it in the first instance"); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975) ("Thus, not only are we unenlightened on the question whether Advice and Appeals Memoranda, as factual matter, contain information the disclosure of which would offend the purposes of Exemption 7, but we are without a lower court opinion on the legal issue. Under such circumstances, we normally decline to consider a legal claim.") (citations omitted).

The Governor relies solely on newspaper and journal articles not included or presented in the lower courts for the claim that the number of sex-selection and fetal tissue sale abortions are increasing, and that therefore this Court should review the constitutionality of a hypothetical statute banning their performance. *See Pet.* at 9 n.9, 10 n.10. But this Court relies on the record of lower court proceedings for evidence before reaching its decisions. *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("Both sides point to newspaper articles in support of their arguments. None of this is record evidence, and we do not consider it"); *see also Curtis Publishing Co. v. Butts*, 398 U.S. 130, 144 (1967) (Court refused to rely on "information outside the record concerning the special legal knowledge of particular attorneys" to decide if one of the parties had knowingly waived a defense). Thus, the Governor has no factual basis for his argument.

III. THIS COURT MAY NOT REWRITE THE GUAM STATUTE TO CONFORM IT TO CONSTITUTIONAL REQUIREMENTS.

The lower courts found unconstitutional the statutory provisions that prohibit all abortions except (1) where the pregnancy is ectopic, and (2) where "there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair her health."[14]

[14]Petitioner advances the interpretation, never suggested in any court below, that the Act's exception for "grave impairment of health" applies only to *physical* health, *Pet.* at 13, and suggests that this Court clarify whether the requirement that post-viability abortions necessary to protect the woman's health applies in the case where the woman's *mental* health is threatened. This interpretation is contradictory to petitioner's argument in the lower court that abortions not sought for medical reasons are not "health-related." Further, petitioner's failure to (continued...)

Petitioner, under the guise of proposing circumstances in which the Act might be constitutionally applied, is in effect requesting this Court to issue a limiting construction of the statute; that is, restricting its application to "sex-selection" abortions, and those allegedly induced by a desire to create medically utilizable fetal remains.[15] *See Pet.* at 9-10 & nn.9 & 10. This request is inappropriate because: (1) such a construction would exceed the authority of this, or any, Court; and (2) it is unsupported by any indication of legislative intent.

It is a fundamental tenet of judicial statutory construction that while "a court should strive to interpret a statute in a way that will avoid an unconstitutional construction . . . it is 'not a license for the judiciary to rewrite language enacted by the legislature.'" *Chapman v. United States*, 111 S. Ct. 1919, 1927 (1991) (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989)). *See also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements"); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1975) ("we are without power to remedy the defects by giving the ordinance constitutionally precise content"); *Hill v. Wallace*, 259 U.S. 44, 70-71 (1922) ("[severability clause] did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not

[14](...continued)
present evidence as to how "health" should be defined, and his failure to request a limiting construction of the term in the lower courts, preclude this Court from addressing the issue here.

[15]Such a limiting construction of the statute would effectively divide all banned abortions into two categories, those that may constitutionally be prohibited and those that may not, and requires impermissible redrafting of the statute.

contain. This is legislative work beyond the power and function of the court."). Courts should only issue narrowing constructions if the statute is "readily susceptible" to such. *American Booksellers Ass'n*, 484 U.S. at 397.

Here, petitioner would have the court construe an absolute ban on abortions as a ban on only some abortions, and has offered two hypothetical situations in which he contends the ban might be constitutional. It is one thing for a court to refuse to invalidate a law which is constitutional in most of its applications, preferring instead to proscribe those few instances in which it cannot be constitutionally applied. It is quite another to uphold an *un*constitutional law by rewriting it to limit its effect to those rare (if not altogether theoretical) potentially constitutional applications. This latter amounts to exactly the type of judicial statutory reconstruction prohibited by a respect for legislative authority, *United States v. Reese*, 92 U.S. 214, 221 (1875), and, in the case of state or territorial statutes, strong federalism concerns. *Eubanks v. Wilkinson*, 937 F.2d 1118, 1127-28 (6th Cir. 1991).

Any judicial construction of a statute must be supported by a clear expression of the legislature's intent in fashioning the statute. *Communication Workers of America v. Beck*, 487 U.S. 735, 762 (1988); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). This is especially true in the case of state law. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Sloan v. Lemon*, 413 U.S. 825, 834 (1973).

Petitioner's proffered interpretation of the Act is wholly unsupported by the legislative history. Nowhere in the Act's history, or in the statute itself, is there any mention

of sex-selection abortions or those induced by a desire to sell fetal parts. The Guam legislature's stated purpose was to ban *all* abortions, and it did not differentiate among the reasons for choosing abortion in a given case, except in very limited exceptions concerning the mother's health or life. By creating a comprehensive and interrelated punitive statutory scheme that would leave no one involved in having or obtaining an abortion unpunished, the legislature made clear its overriding purpose to outlaw abortion completely on Guam. For the Court to construe the Act as requested by petitioner would be to circumvent the Guam legislative process and would undermine the territory's autonomy under our federal system.[16]

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[16]Additionally, petitioner's request for a limiting construction at this point in the proceedings is inappropriate. Both the District Court and the Court of Appeals explicitly construed the statute as a near-complete ban. *See* 2a ("the Territory of Guam enacted a statute . . . outlawing almost all abortions"); 23a ("abortions were effectively banned in the Territory of Guam."). This Court has stated that it will "defer to lower courts on state-law issues unless there is 'plain' error; the view of the lower court is 'clearly wrong;' or the construction is 'clearly erroneous' . . . or 'unreasonable.'" *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.9 (1985) (citations omitted); *see also Casey*, 112 S. Ct. at 2822. Petitioner advances no reason why the Court should not defer to the lower courts' construction of the Act.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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August 17, 1992

APPENDIX

Appendix A*
Letter from Mary Anne Q. Wood

June 30, 1992

The Honorable Thomas J. Greene
United States District Court
350 South Main, #220
Salt Lake City, Utah 84101

Re: Jane L. v. Bangerter No. 91-C-345-G

Dear Judge Greene:

On June 29, 1992, the United States Supreme Court issued its decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, Nos. 91-744, 91-902. A copy of the various opinions of the Justices is attached.

Five Justices in Casey explicitly reaffirmed Roe v. Wade, while at the same time modifying certain aspects of that decision and overruling certain portions of other decisions. The regulations at issue in Casey did not involve a direct prohibition of abortion, but broad dicta in the Joint Opinion of Justices O'Connor, Kennedy and Souter was directed to the constitutionality of state regulatory efforts to prohibit nontherapeutic abortions prior to fetal viability. Under the analysis of that dicta, Utah Code Ann. § 76-7-302(2), to the extent that it prohibits the performance of nontherapeutic abortions prior to twenty weeks gestational age, appears to be unconstitutional.

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*Full copies of all appended documents have been lodged with the Court.

The State of Utah regrets this decision by a bare majority of the United States Supreme Court. The State continues to believe that the proper constitutional analysis is that reflected in the Casey opinions authored by Chief Justice Rehnquist and Justice Scalia for four members of the Court. Furthermore, the current majority approach is splintered and is, in a very real sense, dicta because it was not necessary to the outcome in Casey. Nevertheless, and without foreclosing its options on appeal, the State of Utah will not urge this Court to disregard the guidelines established by the Joint Opinion in Casey.

* * *

[2]

Very truly yours,
/s/MARY ANNE Q. WOOD
Mary Anne Q. Wood

Appendix B
Excerpts from Declaration of John S. Dunlop, M.D.
(May 21, 1990)

JOHN S. DUNLOP, hereby declares under penalty of perjury, as follows:

1. I am one of the plaintiffs in the above-entitled action and I make this declaration in support of plaintiffs' Motion for Summary Judgment and Motion for Permanent Injunction. I have personal knowledge of the facts contained herein.

* * *

3. I am a practicing obstetrician and gynecologist. I am Board certified by the American Board of Obstetrics and Gyneco-[2]logy. I am a member of the Guam Medical Association and the Guam Society of Obstetricians and Gynecologists. I have a private practice with Dr. William Freeman at the Women's Clinic, Suite 211, Second Floor, Paul's Plaza, in Tamuning, Guam.

* * *

[5] 17. During the four days that the law was in effect, a couple of women came into the clinic to ask me about having abortions. I told them they had to wait and see if the law would be challenged I did not perform any abortions at the time. A week before the law went into effect I saw a woman who told me she wanted an abortion. When the law went into effect she came in and I had to tell her I could not perform an abortion for her, that abortions were illegal under the law. I could not tell her were to go to get an abortion. However, soon after Janet Benshoof

was arrested and her speech was published in the newspaper with the address and telephone number of an abortion provider in Honolulu, my partner and I clipped the newspaper article and hung it on our bulletin board for women who came into the clinic. We provided information that our patients needed, even though we were in violation of the solicitation provision of the law.

* * *

[6] 21. Together with my partner, William Freeman, we have approximately 6 to 8 patients for whom we have prescribed IUDs. **[7]** During the four days that the law was in effect, I did not prescribe or dispense IUDs or the "morning after" pill, because I believe that they would be illegal under the law.

* * *

Appendix C
Excerpts from Declaration of William Freeman
(May 22, 1990)

William S. Freeman, hereby declares under penalty of perjury, as follows:

1. I am one of the plaintiffs in the above entitled action and I make this declaration in support of plaintiffs' Motion for Summary Judgment and Motion for Permanent Injunction. I have personal knowledge of the facts contained herein.

* * *

3. I am a practicing obstetrician and gynecologist. I am Board certified by the American Board of Obstetrics and Gynecology and currently hold the American Medical Association physician recognition award. I am a member of the Guam Medical Association and the Guam Society of Obstetricians and Gynecologists. I have a private practice with Dr. John Dunlop at the Women's Clinic, at Suite 211, Second Floor, Paul's Plaza, in Tamuning, Guam. I am also Vice Chairman of the obstetrics and gynecology department at Guam Memorial Hospital (hereinafter **[2]** GMH). My practice involves general obstetrics and gynecology. Most of my work is obstetrics, delivering babies. I also do surgery including hysterectomies and tubal ligations. I also perform first and early second trimester abortions.

* * *

[4] 11. During the four days that Public Law 20-134 was in effect, two women came to my office, I examined them,

and they told me they were going to try to leave the island -- one to Manila, the other to Honolulu -- to obtain abortions. I convinced one of them to stay because I thought that this lawsuit would be enjoined. Fortunately for her, a Temporary Restraining Order was issued and she was able to have an abortion. I do not know what became of the other woman.

* * *

Appendix D
Excerpts from Declaration of Edmund A. Griley, M.D.
(May 21, 1990)

EDMUND A. GRILEY, hereby declares under penalty of perjury, as follows:

1. I am one of the plaintiffs in the above-entitled action. I am President of the Guam Society of Obstetricians and Gynecologists and I am also Chairman of the Department of Obstetrics and Gynecology at the Guam Memorial Hospital. I make this Declaration in support of plaintiffs' Motion for Summary Judgment and Motion for Permanent Injunction. I have personal knowledge of the facts contained herein.

* * *

[10] 21. During the four days the law was in effect many people called the office asking what the law meant. Some women came in seeking abortions. I told everyone that abortions were illegal under the law but I did not advise them where to go to get an abortion for fear of violating the law.

* * *

Appendix E
Deposition of Adolf P. Sgambelluri (May 18, 1990)
Excerpts from Deposition Exhibit 2

[SEAL]

GOVERNMENT OF GUAM
AGANA, GUAM 96910

March 21, 1990

MEMORANDUM (Informational) Ref: AG 90-0300
TO: Chief of Police
FROM: Attorney General
SUBJECT: P.L. 20-134

This office has carefully examined Public Law 20-134 (Bill No. 848 COR) in light of controlling United States Supreme Court decisions, and while we believe the law is unconstitutional, that determination ultimately must be made by the courts. On March 20, this office filed in Superior Court its first criminal complaint under the new law in order to quickly bring the constitutional questions to issue in a judicial forum. Although we will strive for an early resolution of these issues, the court proceedings can be expected to take awhile. In the meantime, we are issuing this memorandum for your information and guidance.

* * *

[4]The cases discussed above, while not exhaustive, will give you an idea of the constitutional tests that P.L. 20-134 faces in the days ahead and why we believe that the new law presents difficult and sensitive law enforcement problems. Notwithstanding the doubtful future of P.L. 20-134, until it is otherwise invalidated by the courts, government agencies, particularly law enforcement agencies

have a duty, we believe, to conduct themselves in a manner that, at least, does not imply that the law can be violated without fear of punishment. On the other hand, we see little reason to commit scarce and costly resources to law enforcement activities while the constitutional viability of the new law remains in doubt. Admittedly, this is a fine and delicate line to be tread. With these considerations in mind, our advice to you at this time, pending resolution of the underlying questions we have raised, is as follows:

1) Refer any questions from members of the public about the law to this office the Attorney General (Main office).

2) Refer any complaints about alleged violations of the law to our Prosecution Division.

3) Make no arrests for alleged violations of the law without express prior approval of the Prosecution Division.

[5]We will be advising you more fully as the situation requires. Please let me know if you need further information or assistance.

/s/ELIZABETH BARRETT-ANDERSON
ELIZABETH BARRETT-ANDERSON

cc: Governor
Speaker, 20th Guam Legislature
Director, Department of Education
Director, Department of Public Health & Social Services
Chief, Guam Fire Department
Administrator, Guam Memorial Hospital

Appendix F
Excerpts from Defendant Ada's Memorandum in Reply to Plaintiffs' Opposition to Motion for Partial Summary Judgment (July 6, 1990)"

* * *

[40] Souder also explains that Catholicism can be considered a custom that justifies the passage of the abortion law to the extent Catholicism has been so integrated into Chamorro culture that to be Catholic and to be Chamorro are one and the same The integration of Catholicism into the Chamorro culture has been such that Catholicism as practiced on Guam has taken on non-religious dimensions. This non-religious dimension evolved from the introduction by the Spanish of Catholicism as means of ensuring social order and unity. For example, it is customary for the Chamorro people to honor the Immaculate Concepcion on December 8th, a territorial holiday. This celebration of a Catholic Feast Day derives its significance from the well-known legend of Santa Maria Kamalen, where fisherman from the village of Males'so (Merizo) found a statue of the Virgin Mary mysteriously floating ashore. Since that time, Chamorro have come to view the Virgin Mary as their protectress. * * *

To the extent Chamorros have embraced Catholicism and to the extent it is accepted that church doctrine prohibits abortion, it is **[41]** accurate to say that Catholicism is a custom that supports the ban on abortions.

* * *

"Footnotes omitted.

No. 92-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH F. ADA, GOVERNOR OF GUAM,
in his official capacity,
Petitioner,

v.

GUAM SOCIETY OF OBSTETRICIANS & GYNECOLOGISTS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONER'S REPLY BRIEF

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September 15, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONER'S REPLY BRIEF

Respondents brought this declaratory judgment action on the broadest of grounds—claiming that Guam P.L. 20-134 is unconstitutional on its face and seeking a permanent injunction against its enforcement in all of its applications. The lower courts granted Respondents the relief requested, declaring the law facially invalid and permanently enjoining its enforcement in all circumstances.

Petitioner has asked this Court to determine whether the grant of that relief was proper. As stated, the Question Presented requests this Court to make at least one, and possibly two, determinations. First, is the Guam law unconstitutional in *all* of its applications? If the answer to this question is in the affirmative, then the Court need go no further because the relief sought and obtained by Respondents clearly would have been proper. If the answer is in the negative, however, the Court must address a second question: May enforcement of a law which has *some* constitutional applications be permanently enjoined in its entirety?

Petitioner submits that under this Court's facial challenge rules, the Guam law may not be declared unconstitutional in its entirety or enjoined in all of its possible applications if it is constitutional in *some* of those applications. *See* Petition at 8. The Petition, relying upon this Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992), argues that the law is constitutional in at least some of its applications. *See Petition* at 8-15. Accordingly, the Ninth Circuit's decision, which holds the Guam law facially invalid and enjoins its enforcement in all circumstances, conflicts with the applicable decisions of this Court.

In their Brief in Opposition, Respondents argue that the Petition should be denied for three reasons. First,

they contend that the Question Presented already was decided in *Roe*, *Doe* and *Casey*. Next, they claim that the Petition seeks an advisory opinion, and thus the Court lacks Article III jurisdiction over this case. Finally, they assert that the Petition impermissibly seeks to have this Court redraft the Guam law. Each of these arguments is based upon a serious mischaracterization of Petitioner's arguments and upon a fundamental misunderstanding of the applicable law, or a failure even to address it. As set forth below, the reasons for denying the Petition are meritless and the reasons for granting the Petition remain substantial. Thus, the Petition should be granted.

I. TO THE EXTENT THAT THE QUESTION PRESENTED ALREADY HAS BEEN DECIDED IN *ROE*, *DOE* AND *CASEY*, IT HAS BEEN DECIDED IN A MANNER THAT CONFLICTS WITH THE NINTH CIRCUIT'S DECISION.

Respondents contend that review should be denied because "this Court [has] settled precisely the question at issue here." Brief in Opposition (Br. Opp.) at 5. They claim that this is so because "this Court reaffirmed [in *Casey*] that a ban on *all* abortions, both before and after viability, such as Guam's, is unconstitutional." *Id.* (emphasis supplied). But the Question Presented for Review in the Petition is *not* whether the Guam law is constitutional in *all* of its applications—the question which *Casey*, *Roe* and *Doe* have answered in the negative. Rather, the Question Presented is whether the law is constitutional in *some* of its applications, and if so, whether it may be constitutionally applied in those instances.

A. The Guam Law Has Some Constitutional Applications.

Petitioner submits that the Guam law must have *some* constitutional applications, unless a woman has an absolute right to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses." *Roe*, 410 U.S. at 153. But *Roe*, *Doe* and *Casey* have rejected the notion that a woman has a right to obtain an abortion for any reason whatsoever throughout the full nine months of pregnancy. *See* Petition at 8-11. Thus, to the extent that *Roe*, *Doe* and *Casey* settled the first part of the Question Presented, they did so in a manner that is consistent with Petitioner's position and that conflicts with the Ninth Circuit's decision.

In support of his argument that the Guam law has some constitutional applications before and after viability, Petitioner suggested some specific examples of abortions that constitutionally may be prohibited, including abortions performed for sex-selection, fetal organ transplant and those performed after viability which are not necessary to preserve the mother's physical health. *See* Petition at 9-14. Respondents apparently believe that abortions for these reasons may not be prohibited. Instead, they argue that a woman has an absolute right to obtain an abortion prior to viability and, thereafter, for broad reasons and without regulation. Br. Opp. at 5 (*quoting Casey*, 112 S.Ct. at 2821); *id.* at 8 n.9, 14 n.14.[1] In making that argument, Respondents quote selectively from *Casey* and disregard other statements in *Casey*, *Roe* and *Doe* which appear to contradict the arguably all-encompassing language upon which they rely. *See* Petition at 7, 10-11. To the extent that there is some doubt regarding the constitutionality of the statute as it pertains to the specific applications suggested to be constitutional by Petitioner, the Question Presented has not yet been answered by this Court. In either case—whether because the Ninth Circuit's decision is in conflict with

---

[1] This Court has never expressly held that a concurring physician requirement would be unconstitutional even after viability where the State has a compelling interest in protecting prenatal life. *Doe*, itself, dealt with first trimester abortions. Moreover, in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 419 (1983), Justice O'Connor noted that the *Doe* Court's striking down of a similar provision was the only case in which this Court had held unconstitutional a provision that was *not* an "undue burden." *Id.* at 464 n.9. Given the adoption of the "undue burden" test by the Joint Opinion in *Casey*, it is not at all clear that such a provision is unconstitutional.

this Court's prior decisions or because the question is still left unresolved—the Petition should be granted.

B. Enforcement of the Guam Law May Not Be Permanently Enjoined In All of Its Applications.

1. In bringing this action for declaratory and injunctive relief, Respondents attacked the Guam law on its face.[2] This Court has often stated:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.

Webster v. Reproductive Health Services, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)). *See* Petition at 8. With the exception of cases implicating First Amendment rights,[3]

[2] Contrary to their assertions, Br. Opp. at 2-3, 9 n.11, Respondents did not bring an "as-applied" challenge to this law, claiming that the law is unconstitutional insofar as it applies to any particular woman (or class of women) in any given set of circumstances. Nor did they seek any "as-applied" relief as an alternative to their request for a declaration that the law is unconstitutional on its face. *See Renne v. Geary*, 111 S.Ct. 2331, 2340 (1991). Indeed, their brief in the Ninth Circuit referred to the complaint (later dismissed) charging Janet Benshoof under the solicitation provision as "the *one* instance in which the Act was applied." Plaintiffs' Br. at 41 n.65 (emphasis supplied). The solicitation provisions of the law were not appealed and are not before this Court. Moreover, it is clear that the lower courts treated Respondents' challenge as a facial challenge—declaring the law unconstitutional in its entirety and enjoining its enforcement in all applications.

[3] The Court has recognized an "overbreadth" claim only "in the limited context of the First Amendment." *Salerno*, 481 U.S. at 745. In such cases, a statute which has some constitutional applications but reaches a substantial amount of constitutionally protected speech may be declared unconstitutional on its face. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982). No First Amendment claims remain in this appeal. *See* Petition at 5. Thus, the strict *Salerno* test should apply.

a facial challenge should be rejected so long as the statute has *some* constitutional applications.[4] Thus, even if the Guam law cannot be constitutionally applied in many of its applications, it should not have been declared unconstitutional *in toto* and enjoined in all of its possible applications.

The Court's decision in *Connecticut v. Menillo*, 423 U.S. 9 (1975), is particularly instructive on this point. The Connecticut statute at issue prohibited "any person" from performing an abortion that was not "necessary to preserve [the pregnant woman's life] or that of her unborn child." *Id.* at 9. Patrick Menillo, a non-physician, was convicted of attempting to perform an abortion in violation of this statute. The Connecticut Supreme Court vacated his conviction because it thought the state abortion law, which did not distinguish between physicians and non-physicians, was "null and void" under this Court's decisions in *Roe* and *Doe* and, therefore, incapable of constitutional application. *Id.* Thus, the law could not be enforced against the performance of any abortions, including those by non-physicians, and defendant's conviction could not stand.[5] This Court vacated the Connec-

[4] "To sustain [the constitutionality of the procedures of the Bail Reform Act] against such a challenge, we need only find them 'adequate to authorize the pretrial detention of *at least some* [persons] charged with crimes,' . . . ." *Salerno*, 481 U.S. at 751, (*quoting Schall v. Martin*, 467 U.S. 253, 264 (1984) (emphasis supplied). *See also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11-12 (1988) (concession that anti-discrimination provisions of city human rights law "could be constitutionally applied at least to some" of the large clubs was fatal to club association's facial challenge).

[5] It should be noted that Dr. Griley's declaration (lodged with the Brief in Opposition) suggests that non-physicians have attempted to perform abortions on Guam. Decl. at par. 8. In one of their pleadings filed in the district court, plaintiffs also claimed that "[s]uruhanas [traditional herbalists in Chamorro culture] are widely known to perform abortions on Guam." Plaintiffs' Opposition to Defendant Ada's Motion for Partial Summary Judgment, at 28. Under the present injunction, the Guam law could not be enforced to prevent such abortions.

ticut Supreme Court's judgment and remanded for further consideration in light of its opinion. In so doing, it held that the law could be applied to abortions performed by non-physicians despite the fact that the statute broadly applied to almost all abortions and, therefore, prohibited many abortions protected under *Roe*.

The Connecticut statute at issue in *Menillo* arguably had fewer constitutional applications than the Guam law. Yet, this Court held that it should not be declared unconstitutional on its face and unenforceable in all of its possible applications. The Ninth Circuit's decision is in direct conflict with this Court's holding in *Menillo*.[6]

2. In large measure, Respondents simply ignore Petitioner's above argument and this Court's well-established precedent regarding facial challenges—addressing it only in a footnote. Br. Opp. at 9-10 n.11. They suggest that the Court's treatment of the spousal notice provision in *Casey* demonstrates that the Court broke with its long-standing precedent and established a new standard for facial challenges involving abortion statutes. According to Respondents, under the new standard, a statute may be "struck down as unconstitutional *on its face*, even though it *might* have a range of constitutional applications" if "in *a large fraction* of the cases in which [the statute] is relevant, it will operate as-a substantial obstacle to a

[6] This Court has repeatedly stated that "the normal rule [is] that partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). *See, e.g., Brockett, id.* at 501-05 (state obscenity statute prohibiting both protected and unprotected speech struck down only in its invalid applications); *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (holding unconstitutional state statute authorizing use of deadly force against fleeing suspects, not on its face, but insofar as it authorized use of lethal force against unarmed and nondangerous suspects); *United States v. Grace*, 461 U.S. 171, 175, 183 (1983) (accepting argument that federal statute prohibiting demonstrations on the Supreme Court grounds could not constitutionally be applied to picketing on the public sidewalks surrounding the building while rejecting contention that statute was invalid on its face).

woman's choice to undergo an abortion." *Id.* at 9-10 n.11 (emphasis in original).

Petitioner acknowledges the apparent tension between this Court's decision in *Casey* and its prior decisions regarding facial challenges in *Menillo*, *Webster* and the other cases cited in the Petition. *See* Petition at 8. However, given the *Casey* Court's heavy reliance on *stare decisis* and its failure to offer any explanation for "abandoning" these long-standing precedents, Petitioner believes that it is unlikely that the Court intended to depart from these legal principles.[7] At a minimum, if the Court does intend to abandon that legal doctrine in the context of abortion, it would seem imperative that the Court do so explicitly. Otherwise, lower courts may erroneously read *Casey* to have done away with the facial challenge rule altogether.

Moreover, assuming, *arguendo*, that Respondents accurately understand *Casey* to have established a new test for facial challenges, the possibility remains that the Guam law meets that test. For example, if the Court were to re-examine the viability concept and reject it, as the Petition requests, the Guam law could be enforced in many more instances than presently would appear

[7] In her dissent in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), Justice O'Connor stated:

> This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. [cit. omit.] Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.

Id. at 814. Justice O'Connor went on to state that although the Court has been deeply divided on other constitutional issues, "except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it." *Id.* This Court's facial challenge rule is precisely the type of "uncontroversial legal doctrine" which should be applied "evenhandedly."

possible.[8] Whether this would satisfy the "new" test for facial challenges would present a case of first impression for the Court. Thus, the Petition should also be granted so that the Court may clarify the proper standard to be applied in facial challenges of this nature.

II. THE PETITION DOES NOT SEEK TO HAVE THE COURT RENDER AN ADVISORY OPINION. NOR DOES IT SEEK TO HAVE THE COURT REDRAFT THE GUAM LAW.

Respondents claim that by suggesting that the law could be constitutionally enforced to prohibit some categories of abortion (*e.g.*, abortions for sex-selection, fetal organ transplant and those performed after viability), Petitioner is creating "hypothetical statutes [that] are [not] the law on Guam or at issue in this case." Br. Opp. at 10. Accordingly, Respondents argue that the Petition should be denied because it "is a request for an advisory opinion." *Id.* Alternatively, Respondents claim that Petitioner "is in effect requesting the Court to issue a limiting construction of the statute" and, thereby, impermissibly seeking to have the Court rewrite the Guam law. *Id.* at 15.

Respondents' arguments appear to be based upon a fundamental misunderstanding of the nature of an advisory opinion and a wholesale disregard for the different legal standards applicable to "facial" and "as-applied" challenges. Much of Respondents' apparent confusion stems from their mistaken notion that because the Guam law does not specifically "mention sex-selection, fetal tissue sales, or even viability," Br. Opp. at 10, the law does not prohibit such abortions. Nothing could be further from the truth.

---

[8] Petitioner notes that Respondents make no attempt to defend the validity of viability as an appropriate constitutional benchmark for the State's authority to prohibit abortion. And for the reasons set forth in the Petition, Petitioner continues to believe that the selection of viability should not be regarded as settled law. *See* Petition at 15-18.

The Guam law prohibits all abortions not necessary to save the mother's life or to prevent grave impairment to her physical health. This broad prohibition clearly includes a prohibition on abortions performed for the above-specified reasons, as well as abortions performed by non-physicians. Thus, Petitioner is in no way "inventing" circumstances to which the law presently does not apply and seeking an advisory opinion to determine whether a future law which did prohibit such abortions could be constitutionally applied.[9] Rather, he is legitimately asking whether he may enforce the law to prohibit the performance of certain abortions which it *already* proscribes. A decision by this Court, holding that he may, certainly will affect the rights of the parties to this litigation,[10] and will be binding on them.

Respondents also claim that by asking this Court whether the Guam law is constitutional in some of its applications, Petitioner is seeking to have the Court redraft the statute or to issue a limiting construction. In suggesting circumstances under which the law may be constitutionally applied, however, Petitioner is doing no such thing. Rather, he is simply acknowledging the facial nature of this challenge—a fact that Respondents steadfastly ignore because they cannot meet their heavy burden

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[9] Respondents' basic mistake in this regard apparently causes them to rely upon such wholly inapplicable cases as *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), where the Court declined to address the constitutionality of administrative regulations that had not yet been formally adopted.

[10] Additionally, Respondents claim that "the lack of a plaintiff with a real stake in the 'controversy' deprives this Court of Article III jurisdiction." Br. Opp. at 10-11. Thus, Respondents appear to suggest that they, as plaintiffs, were not proper parties to obtain a judgment declaring this statute unconstitutional in all of its applications. As a result, they apparently concede that the relief they were granted is broader than to which they were entitled. For the same reason, Respondents' complaint that there is no "factual record" on which the Court could decide whether the applications suggested by Petitioner are constitutional (*id.* at 12-13) cannot be taken seriously.

under the facial challenge rule.[11] The above issues raised by Respondents are not applicable to facial challenges of this nature and the cases they cite are, therefore, inapposite.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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September 15, 1992

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[11] Respondent's reliance upon cases addressing issues of statutory interpretation or construction, vagueness and severance is misplaced. None of those cases is relevant because Petitioner is not asking the Court to interpret an ambiguous section of Guam law or to sever unconstitutional language. Petitioner simply seeks recognition of his authority to enforce the law under those circumstances permitted by the Constitution.

No. 92-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH F. ADA, GOVERNOR OF GUAM, in his official capacity,

Petitioner,

—v.—

GUAM SOCIETY OF OBSTETRICIANS & GYNECOLOGISTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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No. 92-104

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

JOSEPH F. ADA, GOVERNOR OF GUAM,
in his official capacity,

Petitioner,

GUAM SOCIETY OF OBSTETRICIANS &
GYNECOLOGISTS, *et al.*,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

Following the filing of Respondents' Brief in Opposition in this case, the United States Court of Appeals for the Fifth Circuit issued its opinion in *Sojourner T. v. Edwards*, No. 91-3677 (5th Cir. Sept. 22, 1992), affirming the decision of the district court in *Sojourner T. v. Roemer*, 772 F. Supp. 930 (E.D. La. 1991), invalidating Louisiana's penal statute banning abortion. The Court of Appeals based its decision on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), which "held that before viability, a State's interests are not strong

enough to support a prohibition of abortion." 5sa (citing *Casey*, 112 S. Ct. at 2804). The Court of Appeals thus held the Louisiana statute "clearly unconstitutional," 5sa, under the undue burden standard adopted by the Joint Opinion in *Casey*. Moreover, the Court of Appeals correctly recognized that to hold a statute invalid on its face, a court must be satisfied that "the [s]tatute cannot be construed and applied without infringing upon constitutionally protected rights." 5sa (citing *Rust v. Sullivan*, 111 S. Ct. 1759, 1767 (1991)). The opinion by the Fifth Circuit supports Respondents' argument that the Guam statute at issue in this case is clearly unconstitutional under *Casey*, and that only by rewriting the Guam statute could this Court find it valid on its face, since it could not be applied as written without infringing on constitutionally protected rights. The opinion is reproduced as the appendix to this Supplemental Brief.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3677

SOJOURNER T, on Behalf of Herself and All Others Similarly Situated, ET AL.,

Plaintiffs-Appellees,

versus

EDWIN W. EDWARDS, As Governor of the State of Louisiana, ET AL.,

Defendants-Appellants.

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DR. IFEANYI CHARLES OKPALOBI,

Plaintiff-Appellee

versus

RICHARD P. IEYOUB, Attorney General of the State of Louisiana, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before JOLLY, and EMILIO M. GARZA, Circuit Judges, and SHAW, District Judge.*

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* Chief Judge of the United States District Court of the Western District of Louisiana, sitting by designation.

E. GRADY JOLLY, Circuit Judge:

This suit challenges the Louisiana Abortion Statute, which criminalizes performing abortions except under very limited circumstances. In the district court, the plaintiffs argued that the Statute is preempted by federal law, that the Statute is unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973), that the Statute is unconstitutional under *Griswold v. Connecticut*, 381 U.S. 479 (1965), and that the Statute is void for vagueness. The state of Louisiana defended the Statute arguing that *Roe v. Wade* has been overruled *sub silentio* by *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), and its progeny. The district court struck down the Statute, holding that because *Roe v. Wade* is still good law, the Statute is unconstitutional.

The same arguments are presented to us that were made in the district court. After this case was argued before us, the Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 60 U.S.L.W. 4795, Nos. 91-744 & 91-902 (June 29, 1992), reaffirmed the essential holding of *Roe v. Wade*. Because the Louisiana statute is clearly unconstitutional under *Casey*, we affirm the district court's order.

I

Sojourner T., et al., brought this suit in federal district court challenging the Louisiana Abortion Statute. They argued that the state is preempted by the Food, Drug and Cosmetic Act[1] and by FDA regulations approving the use of certain contraceptives. They also argued that the statute

[1] 21 U.S.C. § 360K (1988).

violates the Commerce Clause and that it is unconstitutional under *Roe v. Wade* and *Griswold v. Connecticut*. They requested declaratory and injunctive relief.

Dr. Okpalobi, also seeking declaratory and injunctive relief, challenged the Louisiana statute on vagueness grounds. The district court consolidated these two cases.

Motions for judgment on the pleadings and supporting memoranda were filed by all parties. Pursuant to Fed. R. Civ. P. 12(c), the district court granted the plaintiffs' motion for judgment on the pleadings on the grounds that under *Roe v. Wade*, the Louisiana Abortion Statute is unconstitutional. The state appeals.

II

The Louisiana Abortion Statute was passed on June 18, 1991.[2] It amends and reenacts LSA-R.S. 14:87. The Statute makes it a crime to "administer[] or prescrib[e] any drug, potion, medicine, or any other substance to a female" or to "us[e] any instrumental or external force whatsoever on a female" "with the specific intent of terminating a pregnancy." The Statute provides exceptions when: (1) the physician terminates the pregnancy in order to preserve the life or health of the unborn baby or to remove a dead unborn child; (2) the physician terminates the pregnancy to save the life of the mother; (3) pregnancy is the result of rape; and (4) pregnancy is the result of incest. Before an abortion can be performed under the rape and incest exceptions, certain reporting requirements must be met. For example, the victims must report the rape or incest to law enforcement officials. Also, abortions performed on

[2] 1991 La. Acts 26.

rape and incest victims must be performed within the first thirteen weeks of pregnancy.

No criminal liability attaches to a woman seeking or procuring an abortion.

III

In urging us to uphold the Statute, the state concedes that *Roe v. Wade* has not been expressly overruled. Instead, the state argues that *Roe* has been overruled *sub silentio* by *Webster* and its progeny.

On the other hand, *Sojourner, et al.*, argue that we should avoid deciding this case on constitutional grounds. Instead, we should affirm the district court on the grounds that the Statute is preempted by FDA regulations and by the Food, Drug and Cosmetic Act. They also present alternative arguments: we should affirm the district court on the grounds that the Statute violates the Commerce Clause, on the grounds that the Statute is unconstitutional under *Griswold*, or on the grounds that the Statute is unconstitutional under *Roe*. Their argument that the Statute is preempted by federal law, that the Statute violates the Commerce Clause, and that the statute is unconstitutional under *Griswold* is contingent on their particular reading of the Statute. They argue that the Statute criminalizes the use of contraceptives in Louisiana that act after conception. They argue that if we entertain doubts about this construction of the Statute, we should, before reaching the other issues in this case, certify to the Louisiana Supreme Court the question of whether the Statute criminalizes the use of certain contraceptives.

Dr. Okpalobi argues that the Statute is unconstitutionally vague. His vagueness argument

emphasizes the elusiveness of the definitions of the rape and incest exceptions. He also argues that this court should certify to the Louisiana Supreme Court the question of whether the Act violates the right to privacy guaranteed by Article 1, Section 5 of the Louisiana Constitution.

IV

Below, the plaintiffs challenged the facial validity of the Statute. Thus, we must determine whether the plaintiffs are correct that the Statute cannot be construed and applied without infringing upon constitutionally protected rights. *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991). The district court found that *Roe v. Wade* is still good law ad that the Louisiana Abortion Statute clearly transgresses those constitutional rights, as enunciated in *Roe v. Wade*, of women who seek an abortion.

The Supreme Court recently reaffirmed the essential holding of *Roe v. Wade* in *Casey*. *Casey*, 60 U.S.L.W. at 4798. In *Casey*, the Court held that a woman has a right to chose **[sic]** to have an abortion before viability and that legislation restricting abortions before viability must not place an undue burden on that right. *Id.* "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 4807. The Court held that before viability, a State's interests are not strong enough to support a prohibition of abortion. *Id.* at 4798. Thus, the Louisiana statute is clearly unconstitutional under *Casey*.

V

Sojourner, et al., urge us to avoid deciding this case on constitutional grounds and to affirm the district court on the

grounds that the Statute is preempted by FDA regulations and the Food, Drug and Cosmetic Act, arguing that we must, when possible, decide a case on statutory rather than constitutional grounds. We can, of course, affirm the district court's judgment on any grounds supported by the record. *Mangaroo v. Nelson*, 864 F.2d 1202, 1204 n.2 (5th Cir. 1989). Furthermore, we acknowledge that it is usually true that if a case can be decided either on statutory or constitutional law, we should address the statutory issue first. *Harris v. McRae*, 448 U.S. 297, 306-307 (1980). We do not think, however, that the facts and the procedural posture of this case warrant the application of this jurisprudential principle. The plaintiffs brought a facial challenge to the constitutionality of the Statute. The district court entered a judgment on the pleadings on the grounds that the Statute was unconstitutional under *Roe v. Wade*. It did not address the preemption issue. There was no trial or hearing to develop the record with respect to the several crucial factual and legal issues that underlie the preemption arguments, including whether certain contraceptives act after contraception **[sic]**, and if so, whether the Statute criminalizes the use of these contraceptives. Additionally, we are not applying a new interpretation of the Constitution to decide this case; we are only applying the clear holding of *Casey*. Therefore, the facts and posture of this case do not obligate us to reach the statutory issue first.[3]

Similarly, Dr. Okpalobi urges us to avoid deciding the case on federal constitutional grounds by certifying the question to the Louisiana Supreme Court whether, because it invades the right of privacy, the Statute is

[3] Since we decide this case on the grounds that the Statute is unconstitutional under *Casey*, Sojourner's motion to certify the question of whether the Louisiana Abortion Statute criminalizes the use of certain contraceptives is denied.

unconstitutional under the Article 1, Section 5 of the Louisiana Constitution. Because Dr. Okpalobi raises this issue for the first time on appeal, we do not address it. *Honeycutt v. Long*, 861 F.2d 1346, 1352 (5th Cir. 1988). Planned Parenthood of Louisiana, as *amicus curiae*, argues that we should abstain from deciding this case because there is a pending state court challenge to the Statute under the Louisiana Constitution.[4] This argument was also raised for the first time on appeal, and we therefore do not address it. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 840 n.13 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

VI

In conclusion, we hold that the Louisiana statute, on its face, is plainly unconstitutional under *Casey* because the statute imposes an undue burden on women seeking an abortion before viability.[5] The order of the district court is therefore

AFFIRMED.

[4] Apparently, the state court action was stayed pending the outcome of this suit.

[5] Because we decide the case on the grounds that the Statute is unconstitutional under *Casey*, we do not reach the appellees' arguments that the Statute violates the Commerce Clause, that the Statute is unconstitutional under *Griswold*, or that the Statute is unconstitutionally vague.

EMILIO M. GARZA, Circuit Judge, concurring specially:

I agree with Judge Jolly that "the Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, . . . reaffirmed the essential holding of *Roe v. Wade*"[1] and that "the Louisiana [Abortion] Statute is clearly unconstitutional under *Casey*."[2] *See Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791, 2804, 120 L. Ed. 2d 674 (1992) ("After considering the fundamental constitutional question resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* [that a woman has the right to terminate her pregnancy before viability] should be retained and once again reaffirmed."). Accordingly, I concur in Judge Jolly's opinion.

Casey, nonetheless, causes me concern. "The issue is whether [abortion] is a liberty protected by the Constitution of the United States." *Id.* at 2874 (Scalia, J., dissenting). Two essential facts seem apparent: "[T]he Constitution says absolutely nothing about [abortion], and . . . the longstanding traditions of American Society have permitted [abortion] to be legally proscribed."[3] *Id.* (footnote omitted) (citation omitted). *Casey* "decorate[s] a value

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[1] 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

[2] Slip op. at 2.

[3] *Compare Roe*, 410 U.S. at 138-42, 93 S. Ct. at 719-21 (historical review of abortion laws in America) *with Michael H. v. Gerald D.*, 491 U.S. 110, 121-28, 109 S. Ct. 2333, 2341-44, 105 L. Ed. 2d 91 (1989) (overview of presumption of legitimacy) *and Bowers v. Hardwick*, 478 U.S. 193, 191-95, 106 S. Ct. 2841, 2844-46, 92 L. Ed. 2d 140 (1986) (brief history and list of sodomy laws in America).

judgment[4] and conceal[s] a political choice." *Id.* at 2875. If this assessment is correct, the Court's reaffirmance -- whether viewed as a good or bad result -- has accelerated the Court "towards systematically eliminating checks upon its own power; and [at least with *Roe* and *Casey*] it [has] succumb[ed] [to this temptation]". *Id.* at 2874.

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[4] The joint opinion states: "Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest." *Casey*, 112 S. Ct. at 2806. I do not agree with the joint opinion's articulation of the issue. First, States legislate morality every day in the form of criminal statutes. For example, "[a] person commits an offense if he . . . intentionally or knowingly causes the death of an individual," *see* Tex. Pen. Code Ann. § 19.02 (West 1992), is the legal formulation of the commandment: "Thou shall not kill." *See Bowers v. Hardwick*, 478 U.S. at 196, 106 S. Ct. at 2846 ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts [would] be very busy indeed.").

Second, the underlying constitutional issue is not "whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter," but whether States have the constitutional power to make this ontological choice. For example, States choose for ontological reasons, to protect the lives of their citizens. In this instance, "liberty" gives way to protection of human life. *See Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., dissenting) ("To look 'at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body.'" (quoting *Michael H. v. Gerald D.*, 491 U.S. at 124 n.4, 109 S. Ct. at 2342 n.4 (1989))). The ultimate question -- if one accepts the joint opinion's view that viability is critical -- is whether States have the constitutional authority to decide for themselves whether viability makes an ontological difference.

Because the decision to permit or proscribe abortion is a political choice, I would allow the people of the State of Louisiana to decide this issue for themselves.[5] Nonetheless, I acknowledge that *Casey* controls, and therefore, I concur.

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[5] *See Michael H.*, 491 U.S. at 122, 109 S. Ct. at 2341 ("Whenever the Judiciary [realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, strikes down legislation adopted by a State], it unavoidably preempts for itself another part of the governance of the country without express constitutional authority." (quoting *Moore v. East Cleveland*, 431 U.S. 494, 544, 97 S. Ct. 1932, 1958, 52 L. Ed. 2d 531 (1977))).

SUPREME COURT OF THE UNITED STATES

JOSEPH F. ADA, GOVERNOR OF GUAM *v.* GUAM SOCIETY OF OBSTETRICIANS & GYNECOLOGISTS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92–104. Decided November 30, 1992

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

I dissent from the denial of the petition for writ of certiorari. The Ninth Circuit held in this case that Guam Pub. L. 20–134, outlawing all abortions except in cases of medical emergency, is unconstitutional on its face. That seems to me wrong, since there are apparently some applications of the statute that are perfectly constitutional.

Statutes are ordinarily challenged, and their constitutionality evaluated, "as applied"—that is, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional "as applied" is to prevent its future application in a similar context, but not to render it utterly inoperative. To achieve the latter result, the plaintiff must succeed in challenging the statute "on its face." Our traditional rule has been, however, that a facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied. See, *e.g.*, *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (Bail Reform Act of 1984 not facially unconstitutional). "[C]ourts are not," we have said, "roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick* v.

Oklahoma, 413 U. S. 601, 610–611 (1973). The only exception to this rule recognized in our jurisprudence is the facial challenge based upon First Amendment free-speech grounds. We have applied to statutes restricting speech a so-called "overbreadth" doctrine, rendering such a statute invalid in all its applications (*i.e.*, facially invalid) if it is invalid in any of them. See, *e.g.*, *Gooding* v. *Wilson*, 405 U. S. 518, 520–523 (1972).

The Court's first opinion in the abortion area, *Roe* v. *Wade*, 410 U. S. 113 (1973), seemingly employed an "overbreadth" approach—though without mentioning the term and without analysis. See *id.*, at 164. Later abortion decisions, however, have explicitly rejected application of an "overbreadth" doctrine. See *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) (citing *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 524 (1989) (O'CONNOR, J., concurring in part and concurring in judgment)). As JUSTICE O'CONNOR explained in *Webster*, this Court's previous decisions concerning state and federal funding of abortions "stand for the proposition that some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional." *Id.*, at 524. See also *Rust* v. *Sullivan*, 500 U. S. ___, ___ (1991) (facial challenge to federal regulations limiting the ability of recipients of federal funds to engage in abortion-related activities "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid" (quotation marks omitted; citation omitted)). The Court did not purport to change this well-established rule last Term, in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U. S. ___ (1992).

Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting—through judicial decision or enforcement discretion—statutes that cannot be constitutionally applied

in all cases covered by their language. And it prevents the State (or territory) from punishing people who violate a prohibition that is, in the context in which it is applied, entirely constitutional. Under this Court's current abortion caselaw, including *Casey*, I see no reason why the Guam law would not be constitutional at least in its application to abortions conducted after the point at which the child may live outside the womb. If that is so, the Ninth Circuit should have dismissed the present, across-the-board challenge. It is important for this Court to call attention to the point, since the course taken by the Ninth Circuit here was also followed by the Fifth Circuit in affirming the facial invalidation of Louisiana's abortion statute, see *Sojourner T.* v. *Edwards*, 974 F. 2d 27 (1992)—though it is possible that there, unlike here, the facial challenge point was not asserted by the State.

I would grant certiorari, vacate the decision of the Court of Appeals, and remand the case for the Ninth Circuit to consider, as the prevailing legal standard for facial challenges requires, whether Guam Pub. L. 20–134 has any constitutional applications.